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No. 95-771

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY, PETITIONER

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of punitive damages in this case deprived Ford of its due process right to notice of the kind of conduct that could subject it to punishment.

2. Whether the $6 million dollar punitive damages award in this case is so excessive as to violate due process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company (hereinafter "Ford")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra,* 1a-42a) is not yet reported. The order of the Circuit Court of Lowndes County (App., *infra,* 43a-52a) is unreported.

JURISDICTION

The decision of the Supreme Court of Alabama was rendered on June 9, 1995 (App., *infra,* 1a), and a timely application for rehearing was overruled on August 18, 1995 (App., *infra,* 53a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Respondents Dee-Witt Sperau (who is white) and Samuel Foster (who is African-American) are sophisticated businessmen who wanted to own a Ford dealership and whom Ford considered to be promising dealer candidates. Ford identified for them a successful dealership in Selma, Alabama, which had become available when the dealer died. Respondents performed a thorough investigation of the dealership, reached an agreement to purchase it from the widow of the dealer, and were approved as Ford dealers. The dealership earned a substantial profit during its first year, but subsequently declined and ultimately failed.

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[1] Ford Motor Company's Rule 29.6 statement is set forth at App., *infra,* 54a-55a.

Respondents sued Ford, alleging that Ford had committed the tort of fraudulent "suppression" by failing to disclose data about the historical performance of black dealers as a whole and that, in view of this data, Ford had committed a fraudulent misrepresentation by stating that the racially-neutral financial forecasts it had supplied to them were "reasonable." The jury found Ford liable for fraud, awarding substantial compensatory damages and $6 million in punitive damages, even though (i) Sperau (who is white), not Foster, was the day-to-day operator of the dealership, (ii) respondents had never requested any race-based information, (iii) the race-based data at issue were skewed by statistics on a sizeable category of dealers many of whom, unlike respondents, had not purchased successful on-going dealerships, and (iv) Ford's economic interest was for respondents to succeed and was therefore entirely aligned with their interests.

The questions presented in this petition are (1) whether the imposition of punitive damages violated Ford's due process right to fair notice of the kind of conduct that is subject to punishment and (2) whether the amount of punitive damages is unconstitutionally excessive.

1. *Ford's Minority Dealer Program.* Ford established its Minority Dealer Program in the 1960s to overcome barriers to the ownership of dealerships by members of minority groups. App., *infra,* 5a; R. 1445.[2] Under that program, Ford has implemented a variety of measures to assist promising minority candidates in becoming successful dealers. In particular, with regard to each of the two distinct means of acquiring a dealership — *i.e.,* through private capital and through what is known as the Dealer Development program — Ford provides special opportunities and assistance to minority candidates.

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[2] The designation "R. __" refers to the Reporter's Transcript of the trial below. The designation "C. __" refers to the Clerk's Record, which is comprised of pleadings, motions, briefs, and trial exhibits.

a. *Private Capital Dealerships*. When the owner of a dealership seeks Ford's assistance in locating a buyer (as was the case here), Ford will attempt to identify qualified candidates who can raise on their own the funds necessary to purchase and operate the dealership (as opposed to individuals, who though qualified, cannot raise the needed funds without assistance from Ford). R. 1729. Indeed, if the dealership is a successful one, the owner of the dealership is likely to insist that the candidates be able to finance the acquisition with private capital. *Ibid.* In furtherance of its objective of increasing the number of successful minority dealers, Ford makes a priority of identifying minority candidates for these "private capital" dealerships, particularly the profitable ones. R. 1535, 1586, 1603-1604, 1807-1808, 2288.[3] And once a member of a minority group purchases a dealership with private capital, Ford makes available to that dealership a range of benefits, including special training, assistance from consultants, reimbursement for "launch costs" (which include the costs of cleaning up and/or renovating the dealership, purchasing new signs, changing stationery, etc.), and a special parts return, whereby Ford will pay the dealership in full for obsolete or otherwise unwanted parts that are in its inventory. App., *infra,* 5a; R. 1473-1474, 1544-1548, 1586-1588, 1810, 1937-1940, 1942, 2283-2284.

b. *Dealer Development Dealerships*. Ford's Dealer Development program began in 1950 and is used to provide financial assistance to otherwise qualified dealership candidates who lack sufficient private capital to acquire a dealership. Although that program can be used to replace a successful dealership, it generally is used to replace a

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[3] Ford cannot unilaterally select a replacement for an existing dealer. The most it can do is assist the existing dealer in finding a buyer if the dealer requests assistance. R. 1449, 1588-1590. Importantly, Ford receives no franchise fee or other remuneration when it assists in finding a purchaser for a dealership. R. 1809, 2237-2238.

dealership that had failed or was only marginally profitable. R. 1728-1729, 1941. Thus, as a general matter, the dealerships available under this program are materially different from private capital dealerships. R. 1729.

Under the Dealer Development program, the dealership candidate need come up with no more than 20% of the capital needed to operate the dealership. App., *infra,* 5a; R. 1582-1583, 1733-1734. Because many minority candidates find it difficult to raise even 20% of the capital requirement, Ford often reduces the requirement to as low as 10%. App., *infra,* 5a; R. 1733. Dealer Development participants may run the dealership without risk for up to a year. If, after that time, they choose to withdraw, Ford will return the entirety of their investment regardless of how the dealership performed. Alternatively, if they choose to stay on, they will have the right and obligation to use the profits from the dealership to gradually buy out Ford's stake and ultimately become the full owner. R. 1582-1583, 1732, 1941-1942.

2. *The Events Leading up to Respondents' Acquisition of the Selma Dealership.* Respondent Samuel R. Foster, II, is a sophisticated African-American entrepreneur. In 1987, Foster was operating a construction company in Charlotte, North Carolina. App., *infra,* 8a; R. 268-272, 1219-1220. As a result of social contacts with a Ford employee, Foster was identified as a promising candidate to participate in Ford's Minority Dealer Program. App., *infra,* 8a-9a; R. 277, 382-386, 1503-1505, 1508-1509.

Subsequently, Foster met with Ken Cooper, Ford's Market Representation Manager for the Charlotte District Sales Office, and filled out a dealership application. App., *infra,* 9a; R. 278, 282, 387, 389, 391-393. After Foster filled out the application, Cooper discussed with him the need for a partner with experience in the automotive industry. App., *infra,* 9a; R. 393-394. Cooper offered to help Foster find a partner. R. 282-283, 284-285. Foster ultimately did not pursue Cooper's offer because an employee of Foster's —

respondent Dee-Witt Sperau (who is white) — was willing to join Foster in the venture. Sperau had several years of experience in the automotive industry, both in Ford's employ and at three Ford dealerships. App., *infra,* 9a; R. 287, 435-436.

Don Kitchens, the Atlanta District Market Representation Manager, and his superiors were impressed by the two men's resumes and invited them to a meeting in Atlanta. App., *infra,* 10a; R. 1595-1596, 1821, 1823-1824. At that meeting, Foster and Sperau made a favorable impression on the Ford personnel, who found them to be articulate and to present themselves well. App., *infra,* 10a; R. 1596-1597, 1827.

Shortly after the meeting, Kitchens called Foster to inform him that a dealer in Selma, Alabama, had died and that his widow wanted to sell the dealership. Kitchens invited Foster and Sperau to a second meeting in Atlanta to discuss the Selma dealership. App., *infra,* 10a; R. 293-294, 412-413. At that meeting, Kitchens and his supervisors, District Sales Manager Bill Stang and Assistant District Sales Manager Dale Wendell, expressed the opinion that the Selma dealership was a good one that Foster and Sperau should investigate. R. 294. The Ford employees considered the Selma dealership to be an excellent opportunity because it already was very profitable, market analysis suggested that it had room for additional growth, and it had an experienced staff (including a respected general manager) that was committed to remaining at the dealership. R. 1602-1609.

On February 22, 1988, Kitchens called Foster to provide additional information about the Selma dealership and reaffirm his opinion that it should continue to be profitable. R. 295-297, 417-418, 1831-1832. Kitchens then faxed to Foster a sales and profit forecast for the dealership. App., *infra,* 10a; R. 298-299, 306, 418-419, 956. Sales and profit forecasts, which are routinely prepared as part of the process of appointing a dealer, contain projections of costs, sales, profits, capital required to operate the dealership, and return

on capital. These forecasts are not guarantees of future performance because, in preparing them, Ford cannot account for factors that are out of its control, such as the diligence and prudence of the dealer, changes in the regulatory environment, and future economic conditions. R. 1451-1452, 1838-1839, 1915-1916. Typically, an initial forecast is prepared as soon as a dealership becomes available and before Ford becomes aware of the identity of the potential replacement dealer. R. 806, 840-841, 1839-1840.[4] The forecast sent to Foster and Sperau was of this type; it did not take into account the two men's specific plans for operating the dealership. R. 841-842, 1839-1840. See also R. 1525-1526.

On February 25, 1988, Foster and Sperau visited the dealership. R. 419-420, 955-956. They were accompanied by Ronald Bortnick, a friend of Sperau's with over 20 years experience in the automotive industry, who owned a successful Ford dealership in Maryland. App., *infra,* 10a; R. 299, 422, 437-438, 957. That night, Foster and Sperau decided not to pursue the dealership and called Kitchens to inform him of their decision. App., *infra,* 11a; R. 300-302, 424-425, 445-446, 960.

Several days later, Kitchens sent Foster a revised sales and profit forecast, which, unlike the initial forecast, took into account Foster's and Sperau's plans for operating the dealership. App., *infra,* 11a; R. 961-962, 1840-1845, 1861-1862. See also R. 1527-1530. Like the initial forecast, the

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[4] In preparing an initial forecast, Ford takes into account both the historical data on the dealership — sales, costs, market share, profits, capital invested, etc. — and group averages — *i.e.*, how similarly sized dealers in that district have fared. After Ford has identified specific candidates for the dealership, the forecast may be revised with input from the candidates to take into account their strengths and weaknesses and their plans for operating the dealership. Thus, depending upon the characteristics of the particular dealership candidates, there could well be two or more very different forecasts for the same dealership. R. 807-810, 1525-1530, 1834-1845, 1950-1951, 2231-2232.

revised forecast took no account either of the fact that Foster is black or of the fact that Sperau is white; it is the race-neutral quality of the forecast that formed the basis for respondents' claims against Ford.

The revised forecast reduced the capital the men would be required to invest from $632,000 to $535,000. App., *infra,* 11a; R. 304. This new estimate remained on the conservative side, however, being $187,000 higher than the prior dealer's capital investment. R. 1848. The $97,000 reduction in the capital requirement had the effect of increasing the estimated return on capital from 56% to 65.4%. App., *infra,* 11a; R. 304. The revised projected return, however, remained less than the 70% return earned by the existing dealer in 1987. R. 1847.

Foster and Sperau carefully reviewed the new forecast and discussed the revised figures with both Kitchens and Bortnick. App., *infra,* 11a; R. 304-306, 451-453, 962-963. Kitchens explained to the men that in the revised forecast he had concluded, based on their plans for operating the dealership, that they would need less money for the acquisition of used vehicles than was projected in the first forecast. App., *infra,* 11a; R. 1038-1039, 1842-1844. He accordingly had reduced the projected capital requirement for used vehicles from $268,000 to $231,000. This remained a conservative figure when compared to the less than $120,000 that the prior dealer had set aside to purchase and resell the same number of used vehicles. R. 1842-1843. Kitchens also believed that, because Sperau intended to implement the Automated Inventory Management System ("AIMS"), which would enable the dealership to keep less parts inventory on hand, the dealership would need less money for parts than originally estimated. App., *infra,* 11a; R. 1041-1042, 1075-1076, 1844-1845. The revised forecast thus reduced the projected capital requirement for parts from $133,000 to $96,000. By way of comparison, the prior dealer, who had never automated the

dealership's parts department, had only $67,000 tied up in parts. R. 1844-1845.

Sperau returned to the dealership several times, conferred with the general manager, discussed the dealership's methodology for determining the inventory of parts needed, and investigated the dealership's historical sales data for new and used vehicles as well as for parts. R. 1042-1045, 1087-1088. He also checked Kitchens' forecast for new car sales against the Polk Registrations, a listing of registered vehicles by market area and manufacturer. R. 1059-1060.

Ultimately, having confirmed that the reduction of the cost for parts was consistent with the dealership's data and that the estimates for new and used car sales were in line with the dealership's data and the Polk Registrations, Sperau indicated his satisfaction with the accuracy of the revised forecast. R. 452-453, 1042-1044, 1059-1060. The two men then signed the forecast directly beneath the following admonition: "**Forecast Sales and Profits are believed to be reasonable but cannot be guaranteed. Actual results will depend on managerial ability and future business conditions.**" C. 4897 (emphasis added); App., *infra,* 19a. When they signed the document, Foster and Sperau understood precisely what this statement meant. R. 454-459, 500-501, 1045-1047, 1851-1852.

On March 11, 1988, Foster and Sperau entered into a Buy/Sell agreement with the widow of the Selma dealer. App., *infra,* 11a; R. 312-313. On May 11, 1988, Foster and Sperau signed the documents necessary to acquire the assets of the dealership, consummate the lending arrangements with Ford Credit, and obtain Ford's final approval to operate the dealership. R. 334. One of the documents was a Capital Loan Security Agreement with Ford Credit, which had agreed to lend the dealership $285,000 of the capital requirement as well as $1 million for new vehicle inventory. App., *infra,*

12a; R. 721-722; C. 4257.[5] Among other things, the agreement obligated Foster and Sperau to leave 90% of the profits in the dealership until the dealership's net assets equaled or exceeded $570,000. C. 4918.[6] In addition, the agreement limited Sperau's annual salary to $48,000 and permitted no salary for Foster, who was not expected to be involved in the day-to-day operations of the dealership. C. 4918; R. 503-504, 742-743. The salary permitted for Sperau was twice the amount used in the sales and profit forecast. See C. 4172. It also was twice the prior owner's salary. See R. 503.

3. *Respondents' Mismanagement of the Dealership and its Ultimate Demise*. On May 11, 1988, the dealership began operations under the name River City Ford. App., *infra,* 13a. Under its Minority Dealer Program, Ford provided the dealership with substantial financial assistance. For instance, River City Ford requested and received reimbursement for launch costs in the amount of $19,800. App., *infra,* 5a n.4; C. 4929-4932; R. 491, 894-895, 1637-1638. It also requested and received a $44,116.52 supplemental parts return. App., *infra,* 5a n.4; C. 4959-4960; R. 490-491, 1546-1547.

In the late spring and summer of 1988, Sperau operated the dealership while Foster remained in Charlotte to run his construction business, making only sporadic trips to Selma. R. 346. On September 30, 1988 — only four months after the new owners took over the dealership — Foster sent a letter to Ford Credit requesting approval of a monthly salary

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[5] As a condition of making the $285,000 capital loan, Ford Credit insisted that the men raise an equal amount from other sources, thereby increasing the total capitalization of the dealership to $570,000 — $35,000 more than the projected capital requirement and $222,000 more than the amount invested by the prior dealer. See R. 1848.

[6] In a March 8, 1990 amendment to that document, Sperau and Foster agreed to leave in the dealership *all* profits other than those needed to pay tax liabilities on gross profits. C. 4962.

of $2,500 — *i.e.*, $30,000 per year. R. 363-364, 505-506; C. 4483. Because the dealership was profitable at that time, Ford Credit approved the request. R. 364, 508, 749, 767. Meanwhile, Sperau was taking a salary of $60,000 per year — *i.e.*, $12,000 above the agreed limit and $36,000 above the amount used in the sales and profit forecast — without Ford Credit's approval. R. 1091; C. 4989 (indicating wages of $59,176.04 for 1989). In addition, Sperau's wife Diane was taking a salary — $7,500 for two months work in 1988 (R. 1206-1207) and $12,000 for 1989 (C. 4990). In sum, Foster and the Speraus were together taking over $100,000 per year in salary — *i.e.*, over four times the salary received by the prior dealer and assumed in the forecast.

Later in the fall of 1988, Foster disclosed to Sperau for the first time that he was facing catastrophic tax liability arising out of his operation of the construction business. R. 352, 509, 1099. The IRS had imposed tax liens totalling $116,000 against Foster because, as sole owner of the construction business, he had failed to pay over to the IRS substantial amounts withheld from his employees' paychecks for income tax and social security. He also had failed to remit required amounts of unemployment tax. R. 514-531.[7]

Because Foster himself could not raise the funds to pay off the tax lien and because the IRS could have executed against Foster's share of the dealership, Sperau agreed to borrow the necessary funds from his lender. R. 353, 536-537, 1141. That loan exhausted Sperau's borrowing capacity, thereby preventing him from obtaining additional capital for the dealership. R. 1897-1898.

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[7] Although much of his debt to the IRS had arisen before he began pursuing a dealership, Foster failed to disclose this massive potential liability to Ford or Ford Credit on the financial forms he filled out for each of them. R. 513-531, 1631-1633, 1829-1830.

Foster executed a note in favor of Sperau for part of the amount owed ($83,840). C. 4938. The note obligated him to a repayment schedule of $2,100 per month. R. 990-991. To meet that obligation, Foster began taking a draw of $2,100 per month from River City Ford. R. 586-587.[8] Sperau gave Foster the remainder of the amount due the IRS in exchange for 12% of the shares of the dealership — increasing Sperau's interest to 56% and decreasing Foster's to 44%. R. 353-354, 537-538, 558-559, 1102; C. 4501.

Beginning in the first year and continuing until the business was closed, Sperau and Foster charged substantial amounts of entertainment and other expenses to the dealership as business expenses and used their drawing accounts and employee accounts freely and lavishly for personal expenses.[9] Among other things, they used dealership funds to pay for legal fees for the closing on Sperau's house; interior decorator fees for Sperau's house; college tuition for Sperau's son; a graduation party for Sperau's son; a senior class trip for Sperau's son; cars for Sperau's sons and Foster's mother; gasoline, maintenance, and repairs for those cars; docking and fuel expenses for Sperau's boat; expensive hotels and restaurants throughout the country; nights on the town with

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[8] Initially, this amount was on top of the $2,500 per month draw. Eventually, however, Foster terminated the $2,500 per month draw. R. 990.

[9] A drawing account is a means by which an owner of a dealership can use dealership funds to pay personal expenses. When the owner charges an expense against his or her drawing account, that amount is deducted from his or her share of the profits. R. 978-979, 1095. Of course, if the dealership is not earning any profits, any amounts charged to a drawing account necessarily erode the dealership's capital.

An employee account is used for advances against salary. R. 1107-1108. At the time the dealership closed, Sperau had run up an unpaid balance of $84,000 (*i.e.*, close to two-years worth of *gross* wages) on his employee account. R. 1108-1109.

dealership employees; a membership for Sperau in a racially restricted country club that Foster could not join; clothing; and dog kennel expenses. R. 587-592, 1109-1138, 1153-1155; C. 4442, 5057-5067.

During its seven months of operation in 1988, River City Ford earned profits of $102,682. App., *infra,* 13a; R. 585, 982. The two men's profligate spending habits began taking their toll, however; they were outspending the considerable sums the dealership was bringing in. As a result, in 1989, despite posting new vehicle sales of $4,689,041 and parts sales of $436,108, the dealership reported a loss of $4,124. App., *infra,* 13a; R. 982, 987-988. In 1990, despite new vehicle sales of $4,689,114 and parts sales of $407,188, the dealership reported a loss of $6,347. *Ibid.* During this time, Ford Credit personnel repeatedly told Sperau and Foster in writing and orally that they were taking more money out of the dealership (in salaries and through their drawing accounts) than was permitted under the Capital Loan Security Agreement. R. 775, 777; C. 4296-4297, 4320, 4951.

In January 1991, the dealership went out of trust by $130,000 — *i.e.,* it sold vehicles financed by Ford Credit and failed to use the proceeds to repay the debt, as required by the inventory financing arrangement. App., *infra,* 13a; R. 996-997, 1162-1163. The dealership subsequently filed for protection under the bankruptcy laws. App., *infra,* 13a; R. 998.

4. *Proceedings Below.* Sperau, Foster, and their wives filed a complaint against Ford, Ford Credit, and Ford Credit employee Gary Birdsong alleging fraud, conspiracy, and breach of contract. Ford Credit filed a counterclaim against all plaintiffs for the monies owed to it. The case went to trial on March 29, 1993 and ended in a hung jury. App., *infra,* 1a-2a.

After the trial court granted summary judgment against the wives on their claims (C. 3821), the retrial commenced

on February 14, 1994. At the close of plaintiffs' case, the court granted the defendants directed verdicts on the breach of contract claim as well as on the plaintiffs' claim that Ford personnel had misrepresented that the "vast majority" of minority dealers were successful. R. 1421, 1429-1430. Finally, the court directed a verdict in favor of Ford Credit and Birdsong on all aspects of plaintiffs' fraud claim. R. 1429. At the close of all the evidence, the court granted a directed verdict in favor of all defendants on the conspiracy claim. R. 1977. The case thus went to the jury only on the two men's "fraud and suppression claims [against Ford] in connection with the capitalization and the sales and profit forecasts" (*ibid.*) and Ford Credit's contract claim against Foster, Sperau, and Mrs. Sperau. App., *infra,* 2a-3a.[10]

The misrepresentation and suppression claims were predicated upon the theory that the race of the dealer is relevant to a dealership's likelihood of success and that Ford's failure to take race into account when discussing a potential dealership with an African-American is fraudulent. Thus, ignoring the fact that the dealership was operated by Sperau, who is white, respondents' expert insisted that Ford had committed fraud by not imposing a higher capitalization requirement on the men because black dealers (allegedly) have had a higher failure rate than white dealers. R. 1255-1284, 1307-1309, 1317-1320. Consistent with this race-based theory, respondents requested and received the following "theory-of-the-case" instruction (R. 2084-2085):

> The plaintiffs claim that Don Kitchens, Dale Wendell and Bill Stang represented to the plaintiffs that the sales and profit forecast and capitalization requirements provided to the plaintiffs were reasonable and that the plaintiffs could rely on the

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[10] Ford Credit had dismissed its claim against Mrs. Foster during the first trial.

> numbers contained therein to make their decision to acquire the Selma Ford dealership.
>
> The Plaintiffs say that these representations were made with the intent to deceive them based upon Ford Motor Company's knowledge of the substantial likelihood of failure of Ford black Minority dealerships within the first two years.
>
> The Plaintiffs contend that under the facts of this case Ford Motor Company was under a duty to disclose all material facts concerning the actual profitability, performance of Ford's black minority dealers and the failure rates of such dealers reflected on Ford Motor Company's own historical data collected with regard to Ford's black minority dealerships.

Because respondents had never exhibited the slightest interest in data regarding the performance of minority dealerships, their theory required a finding that Ford had an affirmative duty to volunteer information on the subject.

The jury returned a verdict in favor of Foster and Sperau, awarding $992,000 in economic damages, $2.5 million for mental anguish to Foster, $1 million for mental anguish to Sperau, and $6 million in punitive damages. The jury found in favor of Ford Credit on its counterclaim against the Speraus and Foster, awarding $635,000. App., *infra,* 3a. Ford then moved for judgment n.o.v., new trial, or remittitur. On June 29, 1994, following the post-trial hearing, the trial court issued an order resolving Ford's motions. Although indicating that it "may well have determined otherwise than did the jury concerning both the fraud claim and the suppression claim on which this case went to the jury" (*id.* at 44a), the court denied the motions for judgment n.o.v. and new trial. It also declined to disturb the punitive damages. The court did, however, condition the denial of the new trial motion on Foster's acceptance of a remittitur of his award for mental anguish to $500,000 and

Sperau's acceptance of a remittitur of his award for mental anguish to $200,000, noting that it was "shocked by the size of the verdicts for mental anguish in view of the evidence presented at the trial" (*id.* at 47a). Two days later, Foster and Sperau filed a remittitur of the compensatory damages. *Id.* at 4a.

The Alabama Supreme Court affirmed the judgment in all respects. App., *infra,* 1a-42a. It held that, given Ford's strong desire to recruit promising minority dealers and its superior knowledge of the historical performance of new minority dealers, there was substantial evidence to support the jury's finding that Ford committed a misrepresentation by stating, notwithstanding this knowledge, that the racially neutral sales and profit forecast was "reasonable." *Id.* at 15a-18a. It similarly held that there was sufficient evidence to support the jury's finding that Ford committed the tort of suppression in failing to volunteer the race-based information to respondents (even though they never showed any interest in such data). *Id.* at 18a-19a.[11] The court did not independently consider Ford's claims that respondents had not

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[11] As noted below (at page 25, note 16), the court ignored Ford's argument that this information would actually have been misleading because it was heavily skewed by the inclusion of "Dealer Development" operators, most of whom were in a materially different position from private capital dealers like respondents. The court also ignored Ford's argument that, given the parties' understanding that the dealership would be operated by Sperau — who is *white* — Ford could not fairly be expected to have known that the information on black-operated dealerships would be relevant to respondents.

Additionally, the court rejected Ford's argument that there was no evidence that any "suppression" caused the injuries for which respondents sought damages, injuries that the evidence clearly showed were due to their profligate personal spending habits. In what appears to be a non sequitur, it deemed the claim waived by Ford's failure to object to an instruction describing the types of damages that could be recovered if proximately caused by the alleged fraud. App., *infra,* 22a-23a.

satisfied Alabama's standard for imposing punitive damages and that, in any event, the $6 million punitive exaction was so excessive as to violate due process. Instead, the Alabama Supreme Court adopted the trial court's discussion of punitive damages as its own. *Id.* at 30a.

Justice Houston filed a dissent that was joined by Justice Maddox. App., *infra,* 35a-42a. He stated:

> I am concerned about the effect on the vision of this nation of the tort theories advanced by the plaintiffs in this case — (1) the fact that a person is a member of a racial minority impairs that person's ability to compete, and (2) that businesses that offer minorities the opportunity to compete without disclosing that alleged racial handicap can be liable for compensatory and punitive damages if a member of that minority enters a business and fails.
>
> I am concerned because I do not believe that a person's race impairs his ability to compete, and if we base tort liability on this false premise, we "attempt the Future's portal with the Past's blood rusted key."

Id. at 35a (quoting J. LOWELL, THE PRESENT CRISIS).

Justice Houston further opined that the punitive damages were excessive. Acknowledging that the Alabama Supreme Court had struck down the State's $250,000 cap on punitive damages, which applied in cases that did not involve a pattern or practice of misconduct, Justice Houston nonetheless regarded the $250,000 figure as the best indication of what constitutes a reasonable punishment in non-pattern cases like this one. App., *infra,* 36a-42a.

REASONS FOR GRANTING THE PETITION

This case illustrates the aphorism that no good deed goes unpunished. In continuing its extraordinary and unpredictable expansion of the tort of suppression,[12] the Alabama Supreme Court in this case actually approved punishing Ford $6 million for its industry-leading efforts to increase the number of minority-owned dealerships.[13]

There is no suggestion in this case that the projections provided to respondents were unreasonable in light of the historic performance of the Selma dealership that was being offered to them. Rather, respondents' theory is that because 56% of the stock of River City Ford would be owned by Foster, an African-American, respondents should have been provided with statistics regarding the performance of other minority-run dealerships and should have been required to put up more capital than if Foster had been white. In other words, Ford's punishment in this case rests on the proposition, which was at least tacitly endorsed by the Alabama courts, that Ford actually should be discouraging African-Americans from purchasing dealerships because black dealers,

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[12] See, *e.g.*, *Union Security Life Ins. Co.* v. *Crocker*, 1995 WL 529450, at *4 (Ala. Sept. 8. 1995) (upholding finding of liability against insurer for failing to disclose that, if the applicant falsely answered health questions on the application and soon thereafter died of a preexisting condition, his life insurance claim might be denied); *Independent Life & Accident Ins. Co.* v. *Harrington*, 658 So. 2d 892, 896-897 (Ala. 1994) (upholding finding of liability against insurer for failing to disclose that it would provide refunds to policyholders who requested one in writing), petition for cert. filed, 63 U.S.L.W. 3892 (June 9, 1995) (No. 94-2016).

[13] See R. 2355 (testimony of Ford minority dealer that Ford's program is "superior to what I have seen with General Motors and Chrysler with the avenues that are out there to support the dealers in training, consultants and things of that nature and it's working with the dealers"); R. 2401 (testimony of Chairman of the Ford Lincoln-Mercury Black Dealers Association that Ford has provided opportunities for minority dealers "[b]etter than anybody in the industry").

as a group, allegedly have not fared as well as white dealers, as a group.

The notion that Ford should be punished in any amount for attempting to increase, rather than reduce, opportunities for black entrepreneurs is more than just disturbing. It conflicts with Ford's right to due process because, given Alabama's limitation of punitive damages to those fraud cases in which the defendant intended to deprive the plaintiff of property or otherwise harm the plaintiff (see Ala. Code § 6-11-20), Ford had no notice that its conduct could subject it to punishment.

Moreover, putting aside the question of punitive liability, it is hard to imagine that many objective observers would conclude that $6 million is reasonable punishment for Ford's so-called tort. The conduct here involved no death or serious bodily injury, no preying on vulnerable victims, no breach of fiduciary duty, no wicked purpose of unjust self-enrichment or malicious harm. It involved simply an effort on Ford's part to persuade two experienced businessmen to take over a *successful* dealership. The Alabama Supreme Court apparently believed that effort was too aggressive. See App., *infra*, 29a. But even accepting that conclusion, it is difficult to understand how the assertedly overzealous recruitment of two men, who had the opportunity to investigate fully the dealership they were being offered, is a tort worthy of a $6 million punishment.

This Court has, in case after case, indicated a concern about unrestrained punitive damages. See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340-2341 (1994); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 9-12, 18 (1991); *id.* at 61-62 (O'Connor, J., dissenting); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-271 (1981); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Most recently, the Court granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, to consider, among other things, whether the $2 million punitive damages

award in that case is so excessive as to violate due process. If the Court reaches that issue in *BMW,* its decision surely will bear upon the permissibility of the $6 million punishment here. Accordingly, the Court should at a minimum hold the petition for disposition as appropriate in light of its decision in *BMW.* See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993).

A. The Alabama Courts Deprived Ford Of Due Process By Permitting Imposition Of Punitive Damages Without Fair Notice To Ford That Its Conduct Was Subject To Punishment.

Although the excessiveness issue (discussed below at pages 24-28) would be reason enough to hold and then grant Ford's petition, there is a threshold issue that also is worthy of this Court's review: whether the Due Process Clause of the Fourteenth Amendment forbids imposition of punitive damages when the defendant could not have known that its conduct might be deemed punishable. Here, because Alabama's punitive damages statute unambiguously restricts punitive damages to those fraud cases in which the defendant intended to harm the plaintiff (see Ala. Code § 6-11-20), Ford had no inkling that its conduct could be deemed punishable.

It is a "basic principle" of due process that states must provide "fair warning" of the conduct they deem punishable. *Bouie* v. *City of Columbia,* 378 U.S. 347, 350 (1964). That principle applies not only to criminal prosecutions but also to civil deprivations of liberty or property. See, *e.g., Hoffman Estates* v. *Flipside, Hoffman Estates,* 455 U.S. 489, 498-499 (1982); *Giacco* v. *Pennsylvania,* 382 U.S. 399, 402 (1966); *Cline* v. *Frink Dairy Co.,* 274 U.S. 445, 463 (1927); *Small Co.* v. *American Sugar Refining Co.,* 267 U.S. 233, 239 (1925). It is therefore fully applicable in the area of punitive damages, which, by definition, constitute a civil deprivation

of property in furtherance of a state's interests in retribution and deterrence.

The imposition of punitive damages without adequate notice that the conduct is subject to punishment is a recurring problem (particularly in Alabama). One of the ways in which modern tort litigation has deviated so sharply from past practice is the tremendous expansion of the contexts in which punitive damages are sought and received. *Haslip*, 499 U.S. at 61-62 (O'Connor, J., dissenting); R. BLATT, R. HAMMESFAHR & L. NUGENT, PUNITIVE DAMAGES § 1.2, at 6 (1991); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 14-15 (1982); Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123-124 (1982); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 133-134 (1982). As a result of this judicial belt loosening, defendants often are left with no idea of whether or when they can be subjected to punitive damages. In some cases, a defendant is held liable for punitive damages even though its conduct was not recognized as a tort at the time it occurred. See, *e.g.*, *Aetna Life Ins. Co.* v. *Lavoie*, 470 So. 2d 1060 (Ala. 1984) (affirming imposition of punitive damages for bad faith denial of insurance claim even though claim was denied before Alabama had recognized claim denial as a tort), rev'd on other grounds, 475 U.S. 813 (1986). In other cases, like this one, the defendant's conduct, even if arguably tortious, is deemed subject to punitive damages even though the state law in existence at the time of the conduct indicated that the conduct was not punishable. See pages 22-23, *infra*.

This Court already is aware of the notice problem in the punitive damages context. Indeed, it has expressly recognized that whether retroactive imposition of punitive damages under a new cause of action violates the Contracts Clause is an "important issue[], which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813,

828-829 (1986). See also *Landgraf* v. *U.S.I. Film Prods.*, 114 S. Ct. 1483, 1505 (1994) ("[r]etroactive imposition of punitive damages would raise a serious constitutional question"). Indeed, the Court has twice recently addressed notice arguments under the Due Process Clause.

In *Haslip*, 499 U.S. at 24 n.12, the Court rejected a void-for-vagueness challenge to Alabama's procedure for determining the *amount* of punitive damages. In so doing, the Court drew a distinction between statutes that permit jury discretion in determining "the appropriate consequences of violating a law" and those that give juries no guidance in determining "whether a violation has occurred," strongly implying that, while its precedents do not proscribe the former, they may well prohibit the latter. *Ibid.* (discussing *Giacco*, *supra*, in which the Court invalidated a statute that gave juries standardless discretion to impose court costs against defendants acquitted of misdemeanors).

Two years after *Haslip*, a plurality of the Court rejected a defendant's claim that the imposition of punitive damages against it was improper because it had no notice that West Virginia would permit an award of punitive damages that was "divorced" from the award of compensatory damages. *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2724 (1993). The plurality explained that "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *Ibid.*

The present case affords the Court the opportunity to fill in the final box of the matrix. Unlike in *Haslip*, the notice issue presented here involves Alabama's system for adjudicating *liability* for punitive damages, not the amount of punitive damages. And unlike in *TXO*, Ford's claim is precisely that prior law did *not* fairly indicate that punitive damages might be imposed for the kind of conduct at issue here. The case accordingly squarely presents the question that has been left open in *Lavoie*, *Haslip*, and *TXO*.

What is more, the violation of the "fair notice" principle in this case is particularly stark. At the time Ford allegedly deceived Foster and Sperau into purchasing the then highly *successful* Selma dealership from the widow of the former dealer,[14] Alabama law affirmatively indicated that Ford's conduct was not the sort that could give rise to liability for punitive damages. Specifically, Alabama's punitive damages statute provides in plain language (but presumably no longer means) that punitive damages may not be imposed in a fraud case unless the plaintiff proves by clear and convincing evidence that the fraud was "committed with the intention * * * of thereby depriving [the plaintiff] of property or legal rights or otherwise causing injury." Ala. Code § 6-11-20.

Here there was no contention, let alone evidence, that Ford was motivated by an intention to deprive Foster and Sperau of property or otherwise harm them.[15] In adopting the trial court's decision on punitive damages, the Alabama Supreme Court apparently concluded that the (in our view nonexistent) evidence that Ford intended to deceive Foster and Sperau into acquiring the dealership was in itself sufficient to justify punitive damages. That holding effectively

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[14] It is undisputed that the Selma dealership was healthy and profitable at the time that Foster and Sperau took it over. R. 1603, 1730. It also is undisputed that the dealership generated a good profit in the year after the two men acquired it. App., *infra*, 13a; R. 585, 982-983.

[15] To the contrary, unlike many frauds, where the plaintiff's loss is the defendant's gain, Ford's undeniable interest was for Foster and Sperau to succeed. The more successful that Foster and Sperau could be in operating a Ford dealership, the more cars and parts the dealership would purchase from Ford and the better off Ford would be. Conversely, failure of the dealership would translate directly into harm to Ford, which had expended substantial sums launching it into business (see App., *infra*, 5a n.4) and which would lose market share and suffer other adverse consequences — including a less successful minority dealership program — if respondents did not make a go of it and if, as a result, Ford did not have a successful dealership in that location (see R. 1477-1478, 1544, 1808).

reads the "intent to cause harm" requirement out of the punitive damages statute by allowing punitive damages to be imposed whenever there is a jury issue as to whether the defendant intended to induce reliance — an indispensable element of the underlying tort. Needless to say, at the time of the alleged tort here, Ford hardly could have anticipated that the Alabama courts would, by judicial fiat, eliminate the legislature's "intent to harm" requirement and thereby make all nondisclosures (no matter how innocent or reasonable the motivation) fair game for punitive damages.

The case is, in this regard, remarkably like *Bouie, supra*. There, a statute prohibited the entry onto another's property after the posting of notice prohibiting such entry. The petitioners, two African-American students, were convicted under this statute after refusing to move from a "whites only" lunch counter. The state supreme court upheld the convictions after interpreting the statute to encompass the act of remaining on the premises of another after being asked to leave. This Court reversed, concluding that application of the unambiguously narrow statute to the conduct of the petitioners violated their due process rights. It explained:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow or precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required to speculate as to the meaning of penal statutes * * * or to guess at the statute's meaning and differ as to its application * * *, the violation is that much greater when,

> because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
>
> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.

378 U.S. at 352 (internal quotation marks, citations, and brackets omitted).

Here, as in *Bouie*, the relevant part of Alabama's punitive damages statute was (and is) "narrow and precise." Ford therefore "had no reason even to suspect" that its conduct, which was not even arguably motivated by an intent to deprive Foster and Sperau of property or otherwise harm them, would "be retroactively brought within [the scope of the punitive damages statute] by an act of judicial construction." Accordingly, as in *Bouie*, the imposition of punishment in this case violates due process.

Because the Alabama Supreme Court's judgment upholding the imposition of punitive damages cannot be squared with *Bouie* and the Court's other due process precedents, and because the notice issue is a recurring one in punitive damages litigation, the Court should grant Ford's petition.

B. The $6 Million Punishment Is Grossly Excessive And Therefore Violates The Due Process Clause Of The Fourteenth Amendment.

This case also presents a substantial question whether the amount of punitive damages imposed upon Ford — $6 million — is unconstitutionally excessive. Because the Court already is considering an excessiveness challenge to a seven-figure Alabama punitive damages verdict in *BMW*, it should hold

Ford's petition and dispose of it as appropriate in light of its decision in that case.

Although the ratio of punitive damages to compensatory damages in this case is not enormous (as it is in *BMW*), this case nonetheless bears sufficient similarities to *BMW* to warrant holding the petition until that case is decided. First and foremost, as noted, both cases involve multimillion dollar exactions; indeed, the punitive damages here are three times the size of those at issue in *BMW*.

In addition, as in *BMW*, the conduct for which Ford is being severely punished is minimally (if at all) reprehensible. Specifically, Ford has been fined $6 million for (1) failing to volunteer to respondents (irrelevant and potentially misleading) data about the historical performance of black dealers as a whole, which allegedly might have discouraged respondents from purchasing what was at that time a highly successful dealership and/or (2) misrepresenting that the racially neutral forecast, which respondents never suggested would have been unreasonable for a white purchaser of the Selma dealership, was "reasonable" for a dealership team comprised in part of an African-American partner. App., *infra*, 1a-2a.[16]

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[16] Although the Alabama Supreme Court ignored it, the evidence was uncontroverted that the profitability of black *private capital* dealers was not materially different from that of white dealers. C. 4738; R. 1730, 2295. The statistics that Ford was held liable for not disclosing encompassed (and were dramatically skewed by) data on Dealer Development operators, many of whom were trying their hand, using primarily Ford's capital, at revitalizing previously unsuccessful dealerships or operating start-up dealerships. See pages 3-4, *supra*. Because Foster and Sperau were private capital dealers taking over a successful dealership, the data the jury faulted Ford for not disclosing would have been affirmatively misleading.

The Alabama Supreme Court also disregarded the fact that the person who was to operate the dealership on a day-to-day basis — Sperau — is white. Because of this, it is difficult to fathom how Ford could be faulted at all for not divining that arguably discouraging statistics about the overall

Of course, had Ford done what the jury punished it for not doing, it would likely have been in violation of the provision of the federal civil rights laws, 42 U.S.C. § 1981, which prohibits offering contracts on terms that discriminate on the basis of race.[17] Thus, Ford hardly could be said to have been on notice that its even-handed treatment of Foster and Sperau might be deemed fraudulent under Alabama law. Even in the absence of the federal non-discrimination principle, it is difficult to comprehend how Ford can be faulted for not disclosing discouraging (and in this case wholly irrelevant) race-based data and for not increasing the capitalization requirement because of Foster's race. As the dissenters recognized, the theory of the case upon which respondents prevailed is impossible to square with "this country's efforts to make 'equal opportunity' a reality of the American economy." App., *infra*, 35a-36a.

Ford's motivation in this case was not to enrich itself at respondents' expense, but rather *at worst* was to increase the number of black dealers and thereby enhance its corporate image and increase sales in the black community. App., *infra*, 7a-8a.[18] That is hardly the kind of odious motivation

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performance of black-operated dealerships had any relevance in its dealings with Foster and Sperau.

[17] Although the Alabama Supreme Court held that Ford had not adequately preserved its claim that the judgment here is preempted by Section 1981 (App., *infra*, 23a), the existence of Section 1981 remains highly relevant in gauging the reprehensibility of the conduct for which Ford was punished.

[18] It is undisputed that Ford receives no franchise fee or other remuneration when it assists in finding a purchaser (of whatever race) for a dealership. R. 1809, 2237-2238. It also is undisputed that Ford has lost money on its Minority Dealer Program. See R. 2282, 2386. It nevertheless has continued investing $50 million per year in the program because of its belief that "[it] is the right thing to do." R. 1447, 1948, 2253-2255, 2386, 2438.

that one would think would justify a punishment of this magnitude.

Nor can the punitive exaction be saved by the fact that it is "only" 3½ times the compensatory damages.[19] This is the kind of case in which the obligation to pay compensatory damages will alone provide every bit of deterrence that is needed or justified. See, *e.g.*, *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). Were it not for the fact that the behavior the jury sought to induce likely would violate federal law, the need to pay $1.7 million in compensatory damages in this case (and the prospect of similar compensatory awards in future cases involving the recruitment of minority dealers) would be more than sufficient to induce Ford to abandon the use of racially neutral forecasts and to disclose even immaterial race-based statistics.

The petitioner in *BMW* argues, among other things, that the $2 million exaction against it in that case is disproportionate to the reprehensibility of its conduct. If the Court agrees, that holding surely would bear on the resolution of Ford's similar contention. If the Court does not reach the excessiveness issue in *BMW*, that issue will remain an exceedingly important one that must be dealt with, either in this case or in one of the others that is pending on the same issue. And whichever case ultimately becomes the vehicle for sharpening

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[19] We note that the Court appears to be holding at least one other case that does not involve a very high ratio of punitive to compensatory damages, but that does involve the contention that the multi-million punishment bears no reasonable relationship to the gravity of the misconduct. See *Honda Motor Co.* v. *Oberg*, No. 94-1890 (filed May 17, 1995).

the criteria that identify an unconstitutionally excessive punitive exaction, the prospects are good that the Court's decision will call into question the permissibility of the punitive damages imposed in this case. Accordingly, this Court should at a minimum hold Ford's petition for resolution as appropriate in light of its decision in *BMW*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1995

NOT YET RELEASED FOR PUBLICATION.

DEE-WITT C. SPERAU, ET AL.

v.

FORD MOTOR COMPANY, ET AL.

1931473, 1931591, 1931629.

Supreme Court of Alabama.

June 9, 1995.

PER CURIAM.

This is a fraud case arising out of the purchase of a Ford Motor Company dealership in Selma, Alabama by Samuel R. Foster, II, an African-American minority dealer candidate in Ford Motor Company's Minority Dealer Program, and Dee-Witt C. Sperau, Foster's business partner. This Ford dealership was operated by these plaintiffs under the name of "River City Ford" from May 11, 1988, until the failure of the business in January, 1991.

Foster and Sperau filed a complaint against Ford Motor Company on May 15, 1991, alleging fraud, breach of contract, and violation of the Motor Vehicle Franchise Act, § 8-20-1 et seq., Code of Alabama 1975. Their complaint was first amended to contain a count for civil conspiracy, and again amended to name Sperau's wife, Diane, and Foster's wife, Chandra, as plaintiffs. The second amended complaint made claims for fraud, deceit and fraudulent suppression against Ford Motor Company, Ford Motor Credit Company and Gary L. Birdsong.[1] The basis of the Plaintiffs' claims were that Ford personnel represented to them that the sales and profit forecast and capitalization requirements provided to them were reasonable, and that the plaintiffs could rely on

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[1] Ford Credit's Branch Manager in Dothan, Alabama.

the numbers contained therein to make their decision to acquire the Ford dealership in Selma. The plaintiffs claimed that the representations were made in order to induce them to purchase the Ford dealership and with an intent to deceive them, based upon Ford Motor Company's knowledge that minority dealerships were less successful than the average dealership. It is the plaintiffs' contention that Ford Motor Company was under a duty, because of a confidential relationship and/or special circumstances, to disclose to them all material facts concerning the profitability, performance, and failure rates of minority dealers as reflected in the Equal Opportunity Progress Reports ("EOP Reports") to which only Ford Motor Company had access.

The defendants filed separate answers and motions to dismiss. In addition, Ford Motor Credit Company asserted a counterclaim against the plaintiffs, as guarantors on the debts of River City Ford. The plaintiffs answered, asserting affirmatively the defenses of estoppel, waiver, and unclean hands.

The first trial of the case commenced on March 29, 1993. The trial judge directed a mistrial in the case, based on the inability of the jury to reach a unanimous verdict. The defendants filed notice of appeal with the Supreme Court of Alabama; this Court struck the appeal. The defendants also sought a writ of mandamus on the basis of the trial court's rulings on their post trial motions. The petition for writ of mandamus was denied.

Prior to the second trial of the case, the trial court issued its order concerning various pretrial motions.[2] This order of February 14, 1994, dismissed all claims of plaintiffs Diane Sperau and Chandra Foster and dismissed the fraud claims of

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[2] Plaintiffs' Motion in Limine; Defendants' Motion in Limine; Motion for Sequestered Voir Dire, Motion for Summary Judgment, and Motion for Partial Summary Judgment.

Sperau and Foster against Ford Motor Credit Company and Gary Birdsong.

The case then came on to be tried. On February 18, 1994, at the close of the plaintiffs' evidence, the trial court granted a directed verdict on the breach of contract claims of Foster and Sperau to Ford Motor Credit Company. The trial court also directed a verdict on plaintiffs' claims that Ford personnel had made misrepresentations regarding the rate of success and profitability of minority dealers. Finally, the trial court directed a verdict in favor of Ford Motor Credit Company and Gary Birdsong on all aspects of plaintiffs' fraud claim and in favor of all defendants on the conspiracy claim. The case went to the jury only on Foster and Sperau's fraud and suppression claims against Ford in connection with the capitalization and the sales and profits forecasts and Ford Motor Credit's contract claim against Foster, Dee-Witt Sperau, and Diane Sperau. The jury reached a verdict on February 23, 1994 as follows:

> "We the jury, find for the plaintiffs on their claim of fraud and assess damages as follows:
>
> 1. Compensatory damages
>
> | | |
> |---|---|
> | Economic loss | $ 992,000.00 |
> | Mental anguish for Samuel Foster, Jr. | $2,500,000.00 |
> | Mental anguish for Dee-Witt C. Sperau | $1,000,000.00 |
> | 2. Punitive damages | $6,000,000.00 |
>
> It is our intention to assess total damages in the amount of $10,492,000.00."

In addition, the jury found for the defendant Ford Motor Credit Company against plaintiffs Dee-Witt Sperau, Samuel Foster and Diane Sperau on the counter-claim of Ford Motor Credit Company and assessed damages in the amount of $635,000.00. At the request of the defendants, the trial judge

polled each of the jurors, and each juror affirmed that the verdict was his or her verdict.

Ford Motor Company filed numerous post-trial motions and the trial judge conducted an extensive Hammond hearing on April 28-29, 1994.[3] The trial judge heard oral argument and received evidence on Ford Motor Company's motion for a new trial, motion for JNOV, motion for remittitur of damages and motion for review of punitive damages award.

On June 29, 1994, the trial court issued its order affirming the jury's verdict and denying Ford Motor Company's post-trial motions, with the exception of the motion for a new trial. The trial judge granted a new trial conditioned upon the plaintiff's acceptance of a remittitur of the mental anguish award for Dee-Witt Sperau to $200,000 and for Samuel Foster to $500,000. This remittitur was accepted by the plaintiffs on July 1, 1994. The total amount of judgment as remitted was $7,692,000.

On the same day, the plaintiffs filed their notice of appeal to this Court, based upon the trial court's dismissal in favor of Ford Motor Company and against Diane Sperau and Chandra Foster on their fraud claim, and the trial court's granting of a directed verdict on plaintiff's contract claim in favor of Ford Motor Credit Company and against Dee-Witt Sperau and Samuel Foster. On August 12, 1994, Ford Motor Company filed its cross-appeal. On August 16, 1994, Plaintiffs Dee-Witt Sperau and Samuel Foster filed their cross-appeal, seeking reinstatement of the jury's entire award for mental anguish.

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[3] The hearing was held in accordance with guidelines set out in *Hammond* v. *City of Gadsden*, 492 So.2d 1374 (Al. 1986); *Harmon* v. *Motors Insurance Corp.*, 493 So.2d 1370 (Ala. 1986); and *Alabama Farm Bureau Mutual Cas. Ins. Co.* v. *Griffin*, 493 So.2d 1379 (Ala. 1986).

Factual Background

In the 1960's the Ford Motor Company initiated a Minority Dealer Program. At the time the program was initiated, there were over 5,000 Ford and Lincoln-Mercury dealers in the country, with only 20 to 30 being operated by African-Americans. The Minority Dealer Program is a part of a larger program called the Ford Dealer Development Program. By the 1980's, the program's primary emphasis had turned to efforts to recruit African-Americans to become franchised dealers. Ford provides these minority "private capital" dealers with benefits that include special training and assistance from consultants. These "private capital" minority dealers may also apply for "launch costs" for opening the dealership and to a special parts return, under which Ford pays them in full for any obsolete or otherwise unwanted parts that are in their inventory a year and a half after the acquisition of the dealership.[4] Ford also has a "Dealer Development" program that requires the candidate for a dealership to raise 20% of the capital requirement. Because many minority candidates have difficulty raising the 20%, Ford can reduce the requirement to as low as 10%.

Each year, Ford management presents Equal Opportunity Progress Reports ("EOP Reports") to Ford Motor Company's board of directors, as a means of describing progress in achieving stated goals of the Minority Dealer Program. The EOP Reports show that, historically, the average return on investment for African- American dealers is lower than the average return on investment for all Ford and Lincoln-Mercury dealers. Ford management, through these reports, gained knowledge of material facts, regarding the historic performance of African-American dealers participating in Ford's Minority Dealer Program, and of

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[4] Foster and Sperau received $19,800 in launch costs and $44,116.52 in supplemental parts return.

factors bearing on the success and failure of these dealers. This information was not otherwise available to African-American dealers, unless Ford chose to reveal it to them.

The October, 1984, EOP Report reflected that as of August, 1984, the return on guide investment for all Ford and Lincoln-Mercury dealers was 53%, a record high, while the return for African-American dealers was 25%. The October, 1985 EOP Report, expressed the concern that a higher percentage of African-American dealers (34%), were in a loss position compared to the total dealer body (16%) at a time of record dealer profits in a strong automotive industry. In December, 1984, Ford issued a "Blue Letter" in which a goal of 320 African-American dealers by year-end 1989 was set by the Executive Vice-President of Ford's North American Operations, Harold Pohling. In order to accomplish this goal, district managers were assigned objectives for their sales districts, and this became a factor in the performance evaluations of Ford district managers and market representation managers. Beginning in October, 1985, Ford management began to actively recruit private capital African-American dealer candidates. The October, 1986, EOP Report acknowledged the difficulty of recruiting candidates with the required unencumbered capital of $350,000. The 1986 EOP Report also reflected that the year end return on guide investment for the black dealer body was 13%, compared to 39% for all Ford and Lincoln-Mercury dealers. Among the factors stated in the EOP Report as contributing to the differences in the performance of African-American dealers were 1) because many of the newly appointed dealers were relatively new to the business and lacked management experience; 2) that their dealerships were in the early stages of development and were still encountering start-up costs; and 3) that the more profitable dealerships of African-Americans had been in business longer than two years.

The EOP Report of October, 1987, states: "Because of the marginal profitability of newly appointed dealers, and our aggressive black dealer appointment target, we will continue to have a high number of black loss dealers until they have gained more retail experience." The EOP Report of October, 1988, states "... we can expect to have a high number of black loss dealers until they have gained more retail experience." That EOP Report also showed that for year-end 1987, the average return on guide investment for black dealers was 17%, which was 20% below the total dealer body. The EOP Report of October, 1989, stated:

> Black dealer profits declined from $16.7 million in 1987 to $11.2 million in 1988. During the first several months of 1989, black dealers lost $18.3 million compared with a $19 million profit during the same period in 1988, a year-over-year decline of more than $37 million.

As of July 31, 1989, 66% of all African-American Ford dealers were in a loss position.

It is undisputed that Ford did not disclose the facts reflected in the EOP Reports to its African-American dealer candidates. Instead, African-American dealer candidates were provided sales and profit forecasts, reflecting returns on investment for dealer points which, in this case, was as high as 65.4%. Ford management's decision to suppress the material facts was motivated by their objective to aggressively increase Ford's count of African-American dealers.

The testimony of Ford management was that Ford promoted the minority dealer program to enhance its corporate image and to increase sales. Ford recognized that the loss of African-American dealers was a problem not only for Ford, but for General Motors and Chrysler as well. The EOP Report of October, 1987, states: "While the percent of loss black dealers (23%) is higher than the national average, it does compare favorably to General Motors and Chrysler

(28%), despite the fact that General Motors and Chrysler have less aggressive appointment activity which should serve to lower their percent of loss black dealers." Ford management believed that it was significant to have more African-American dealers than did Chrysler and General Motors, based upon the perceived benefit of improved corporate image. The second objective Ford sought was an increase in sales. Ford's Manager of Dealer Operations for the Eastern United States, Robert Sullivan, testified that 12.5% of the population is African-American, while only 5% of the population are Ford customers.

Ford also profited from a continued market presence in less desirable geographic locations by arranging sales of dealerships to African-American dealer candidates in those locations. Ford Motor explained Ford Credit's loss "in part from the geographic and demographic disadvantages that many black dealers face because of geographic location."

In order to accomplish its goal of increasing the count of African-American dealers, Ford management assigned objectives to its district managers for their particular sales districts. Those objectives were a factor in the performance evaluations of Ford district managers and market representation managers.

In 1987, both plaintiffs were engaged in the construction business in North Carolina. Foster was the owner and general manager of Foster Construction Company. Sperau was the financial director and assistant general manager of the same company. Foster regularly attended monthly social gatherings of African-American professionals in the Charlotte area, known as "First Fridays." There, he frequently saw Cornelius Willingham, an employee in Ford's District Sales Office in Charlotte, North Carolina. Foster and Willingham discussed acquaintances who were successful minority dealers and Ford's Minority Dealer Program. Foster had some familiarity with the program by virtue of an article in Black Enterprise magazine. Foster testified that Willingham told

him that the vast majority of African-American dealers participating in the program were making profits and receiving a good return on their investment.

Foster then received a call from Ken Cooper, Ford's Market Representation Manager for the Charlotte, North Carolina, District Sales Office to arrange a meeting to discuss Ford's Minority Dealer Program. Foster testified that Cooper told him in their meeting that the majority of black dealers had been successful and profitable and had received a good return on their investment. Cooper gave Foster a dealership application.

In November of 1987, after submitting the application, Foster met with Mike Shanks, Ford Sales Manager for the Atlanta Region, and Ken Cooper. Since Foster had no experience in the automobile business, it was suggested that Foster take on an experienced partner to participate in the Minority Dealer Program. Following this meeting, Foster spoke with Dee-Witt Sperau, who had some experience in the industry.

In January, 1988, Sperau and Foster attended a meeting with Ken Cooper. Foster testified Cooper told them that a vast majority of the black dealers were successful and making a profit. Foster indicated a lack of interest in the minority dealer training program, because he did not want to leave his business in Charlotte to train full-time, and because his position on the Board of Trustees of the University of South Carolina required him to live in the judicial circuit from which he was elected. Cooper provided Sperau with a dealer application, which Sperau completed and submitted to Ford on January 20, 1988. Later that month, Foster and Sperau had a second meeting with Cooper to discuss the potential for a dealership opportunity in the Carolinas.

About that same time, Foster again spoke with Willingham, who had joined the Atlanta District Sales office. Willingham requested that Foster send him a copy of an

Ebony magazine article, which named Foster as one of 30 influential young African-Americans. Willingham gave the article to Don Kitchens, the Atlanta District Market Representation Manager. Kitchens and his superiors were impressed by the article and by Foster and Sperau's resumes. Foster and Sperau were invited to a meeting in Atlanta where they met with Kitchens; Bill Stang, Ford's Atlanta district sales manager; and Dale Wendell, assistant district sales manager. Foster testified that at this meeting these Ford managers expressed to him that they were very serious about appointing African-American dealers in the Southeast. Don Kitchens admitted in his testimony that, during his recruitment of Foster, he probably told him that the vast majority of Ford minority dealers were profitable. Foster repeated that he wanted to remain in the Carolinas.

Ford personnel found Foster and Sperau to be good dealer candidates: Foster had experience in banking, real estate, and the construction business. He was a graduate of the University of South Carolina and was the first African-American ever appointed to its Board of Trustees. Sperau had attended Benjamin Franklin University where he studied finance and accounting, graduating in 1968. He had worked in the automobile business in Rockville, Maryland, and worked for Ford Motor Company in dealer development, although for less than a year.

In February 1988, Foster received a telephone call from Don Kitchens, who stated that he knew that Foster wanted to stay in the Carolinas, but that there were good opportunities available in the Atlanta District and that a specific opportunity was available in Selma, Alabama, where a dealer had died. Kitchens sent a "sales and profit forecast" of the dealership by facsimile transmission to Foster. The profit and sales forecast showed a return on investment of 56% and contained a capital requirement of $632,000.00. Foster and Sperau visited the dealership, accompanied by Ronnie Bortnick, a friend of Sperau's, who owned a Maryland Ford dealership.

After the Selma visit, Sperau and Foster decided not to pursue the dealership. They called Kitchens and told him they were not interested because of the $632,000 capitalization requirement, because Selma was not in the Carolinas, and because the dealership could not support two families. Foster reiterated to Kitchens that they wanted a dealership closer to Foster's home. Kitchens then called Foster and told him he was sending a revised sales and profit forecast and capitalization requirement. The revised forecast reduced the capital the men would need to operate the dealership from $632,000 to $535,000 and increased the estimated return on capital from 56% to 65.4%. Foster testified that he questioned Kitchens concerning the differences between the two forecasts, and that Kitchens told him he had looked at the market again and that $535,000 would adequately capitalize the dealership and that Foster and Sperau could rely on the sales and profit forecast and capitalization requirement. Kitchens testified at trial that the revised forecast was based upon spending less money for the acquisition of used cars than was projected in the first forecast. He also testified that he concluded the dealership would need less money for parts.

Foster and Sperau met again with Kitchens, Wendell and Stang in Atlanta to discuss the Selma dealership on March 1, 1988. At this meeting, the Minority Dealer Program was discussed and Stang encouraged Foster to secure the financing. Foster testified that Kitchens again assured him that the sales and profit forecast and capitalization requirement were reliable and asked him to go forward with investing in the Selma dealership.

On March 11, 1988, Sperau and Foster entered into a buy/sell agreement with the seller of the Selma dealership. Under the agreement, Foster and Sperau were not obligated to acquire the dealership and its property until they obtained Ford's approval and secured financing. They then sought the capital necessary to buy the dealership. They raised 50% of

the necessary capital from their own funds, a loan from Foster's father, a loan from a friend, and a bank loan. They borrowed the remaining 50% of the capital, $285,000, from Ford Motor Credit Company.

On March 22, 1988, Don Kitchens arranged for Foster and Sperau to meet with Gary Birdsong and Arlen Williams of Ford Motor Credit's Dothan office. The purpose of the meeting was to discuss a loan for the River City dealership with Ford Motor Credit Company. This included $1,000,000 for a wholesale credit line; $400,000 for a mortgage loan to purchase the building; and a $320,000 capital loan to operate the business. Foster submitted the loan documents to Birdsong and Williams who were to perform the credit investigation and analysis for submission of the River City loan package to the Ford Credit office in Dearborn, Michigan. Birdsong recommended to this Ford Credit office that the River City application be rejected on the grounds that the tangible based capital and working capital appeared inadequate. The loan application had a numerical rating of -128 on a scale of +118 to -246. A Ford Credit staff operations manager, Mr. Cottingham, also recommended that the loan be rejected, as did his superior, Mr. Chadwick.

Ultimately, the executive vice-president of Ford Credit, Don Cook, prepared a memorandum rejecting the River City loan application which had reduced the capital loan from $320,000 to $285,000, requiring additional investment by Foster and Sperau of $35,000.00. Neither Ford Credit nor anyone with Ford communicated to the plaintiffs that Ford Credit had rejected their application for a capital loan. Don Kitchens simply told Foster and Sperau that the dealership would be stronger if they put up an additional $35,000. At trial, Ford's Bill Stang admitted that he spoke with Don Cook at Ford Credit about the River City loan application. He submitted a cover letter with the appointment file for Foster and Sperau, recommending approval of the loan. On April 26, 1988, the capital loan was approved, however Ford

Credit required that Foster, Sperau and their wives personally guarantee it.

Foster and Sperau obtained Ford's approval as operators of the dealership by agreeing that Foster would own a majority, 56%, of the stock, but would not run the dealership. Instead, he would come to Selma one week each month. Under that same agreement, Sperau was to operate the dealership on a day-to-day basis.

On May 11, 1988, the dealership began operations under the name "River City Ford." During the seven months of operation in calendar year 1988, River City Ford had gross profits of $102,682. In the second year of operation, River City Ford realized a loss of $4,124, despite posting new vehicle sales of $4,689,041 and parts sales of $463,108. By October 4, 1989, Ford Credit identified River City Ford as being in financial trouble and Ford Credit personnel requested permission to do a physical audit due to the poor financial condition of the dealership. By 1990, Sperau recognized that the dealership did not have enough capital to cover inventory to do business.

On March 8, 1990, River City Ford borrowed an additional $72,000 from Ford Motor Credit, taking the capital loan balance back to $285,000. River City Ford had a year-end loss of $6,347 for 1990 despite the fact that new vehicle sales were $4,689,114 and parts sales of $407,188. By January, 1991, the dealership was "out of trust" with Ford Motor Credit. Sperau and Foster met with Gary Birdsong and Arlen Williams from Ford Motor Credit in an effort to resolve the problem. Being unable to do so, River City Ford filed bankruptcy and the dealership was closed.

I.

We first address the issues presented by Ford's cross-appeal. Ford contends that the plaintiffs' theories of liability were not supported by substantial evidence. They cite the plaintiffs' theory of the case, as summarized by the

trial court in its instruction to the jury on the plaintiffs' claims and defenses:

> "The plaintiffs claim that Don Kitchens, Dale Wendell and Bill Stang represented to the plaintiffs that the sales and profit forecast and capitalization requirements provided to the plaintiffs were reasonable and that the plaintiffs could rely on the numbers contained therein to make their decision to acquire the Selma Ford dealership.
>
> The plaintiffs say that these representations were made with the intent to deceive them, based upon Ford Motor Company's knowledge of the substantial likelihood of failure of Ford black minority dealerships within the first two years.
>
> The plaintiffs contend that under the facts of this case, Ford Motor Company was under a duty to disclose all material facts concerning the actual profitability performance of Ford's black minority dealers and the failure rates of such dealers, reflected on Ford Motor Company's own historical data collected with regard to Ford's black minority dealerships."

Our review of issues questioning the sufficiency of evidence begins with a presumption that a judgment based on a jury verdict is correct. *King Motor Co., Inc.* v. *Wilson*, 612 So.2d 1153 (Ala.1992); *White* v. *Fridge*, 461 So.2d 793, 794 (Ala.1984); *Alpine Bay Resorts, Inc.* v. *Wyatt*, 539 So.2d 160, 162 (Ala.1988). The strength of a jury verdict is based upon the right to a trial by jury. *King Motor*, supra. This court has noted the following regarding this presumption:

> "Upon review of a jury verdict, we presume that the verdict was correct; we review the tendencies of the evidence most favorably to the prevailing party; and we indulge such reasonable inferences as the jury was free to draw from the evidence. We will not overturn a jury verdict unless the evidence against the verdict is so much

> more credible and convincing to the mind than the evidence supporting the verdict that it clearly indicates the jury's verdict was wrong and unjust."

King Motor, at 1155 (citing *Campbell* v. *Burns*, 512 So.2d 1341, 1343 (Ala.1987). Thus, this Court will not reverse this judgment, based on a jury verdict, on the ground that the evidence was insufficient unless the evidence, when viewed in a light most favorable to Dee-Witt Sperau and Samuel Foster, indicates that the verdict was "plainly and palpably wrong and unjust."

In an action for fraudulent misrepresentation, there must be a 1) misrepresentation of material fact 2) concerning a material existing fact, which was 3) relied on by the plaintiffs 4) to their detriment. § 6-5-101, Ala. Code 1975; *Crowder* v. *Memory Hill Gardens, Inc.*, 516 So.2d 602 (Ala. 1987). To support a claim alleging suppression of a material fact, the plaintiff must offer substantial evidence 1) that the defendant suppressed a material fact 2) that the defendant had a duty to communicate that material fact, either because of a confidential relationship between the parties, or because of the particular circumstances of the case, and 3) that the plaintiff suffered actual injury as a result of the suppression. § 6-5-102, Ala. Code 1975; *Boswell* v. *Liberty Nat. Life Ins. Co.*, 643 So.2d 580 (Ala. 1994); *Interstate Truck Leasing, Inc.* v. *Bender*, 608 So.2d 716 (Ala. 1992).

Ford argues that there is no evidence that it failed to disclose a material fact or suppressed a material fact. We disagree. The trial judge made the following finding in his Hammond order:

> "There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive, based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the

> jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers."

There is no dispute that the first profit and sales forecast provided by Ford to Foster and Sperau showed a projected return from the Selma dealership of 56%. The second, showed a 65.4% return. The first projected capital requirement was $632,000; the second was $535,000. The plaintiffs' expert, Dr. Charlie Carter, found the 65.4% return to be misleading. Even Ford's designated representative, Jim Ludlow, a Ford employee of 28 years described the change in the dealer investment to be "significant."

Robert Sullivan, a senior Ford executive who assisted in the preparation of the EOP Reports, admitted from the witness stand, as he read an excerpt from the 1987 EOP Report, that Ford knew that many African-American dealers would experience losses because of the marginal profits of newly appointed black dealers in Ford's aggressive black dealer appointment target:

> "Q. Read that bottom paragraph to the jury, please.
>
> "A. 'Because of the marginal profitability of newly appointed dealers in our aggressive black dealer appointment target we will continue to have a high number of black loss dealers until they gain more retail experience.'
>
> "Q. Was that true in November of 1987?
>
> "A. Yes.
>
> "Q. And did the management of Ford know that to be true?
>
> "A. Yes.

"Q. That you had marginal profitability in newly appointed black dealers?

"A. Yes, it says marginal profitability of new appointed dealers.

"Q. Wasn't this referring to minority dealers?

"A. Yes, it is. Also is true for non-minority dealers.

Ford argues that the representations made in this case were opinions, not representations of material fact. If there is proof of actual fraudulent intent at the time the representation is made, and the person succeeds in the deception and the injury results, an action for fraud may be predicated on such a representation, notwithstanding the opinion nature of the representation. *Reynolds* v. *Mitchell*, 529 So.2d 227, 231 (1988). The question of intent is a matter for the jury. *Id.* This Court has recognized that where the facts are not equally known to both parties, a statement of opinion by one who knows the facts better, often involves a statement of material fact that justifies the opinion, such that an action for fraud may be predicated upon the statement. *Id.* Whether a statement is an expression of an opinion or a statement of fact depends upon all the circumstances of the particular case and the question should be left to the jury. *Joe Cooper & Associates, Inc.*, 614 So.2d 982 (Ala. 1992); *Boswell* v. *Coker*, 519 So.2d 493 (Ala. 1987).

In this case, there was substantial evidence from which the jury could conclude that Ford occupied a superior position with respect to historical information, as evidenced by the EOP Reports, which could predict future sales and profits. Additionally, Ford had established its own guidelines regarding initial capital requirements. The plaintiffs did not have this information at their disposal, and thus had to rely upon the statements made by representatives of Ford and Ford Motor Credit regarding the Selma dealership. The jury had substantial evidence before it concerning the aggressive

recruitment of Foster and Ford's manipulation of the capitalization requirement and sales and profit forecasts.

II.

Ford argues that it had no duty to disclose "race-based" data and that such data was not material. The plaintiffs read the testimony of Robert Sullivan from the first trial of the case into the record. In it, Sullivan testified that if he were called upon to prepare a profit and sales forecast and/or capital requirement for a newly appointed African-American dealer, he would certainly take the fact that the dealer was a minority into consideration.

A duty to disclose arises if a confidential relationship exists between the parties or the particular circumstances of the case mandate disclosure. *First Alabama Bank of Montgomery, N.A.* v. *First State Insurance Co.*, 899 F.2d 1045 (11th Cir. Ala. 1990). The factors to be considered are the trust or confidence between the parties, the value of the particular fact, the relative knowledge and bargaining position of the parties, and other circumstances surrounding the transaction. *Jim Walter Homes, Inc.* v. *Waldrop*, 448 So.2d 301 (Ala. 1983). Furthermore, if the plaintiff is induced to take action that he otherwise would not have taken had there been full disclosure, the duty to disclose is more compelling. *Baker* v. *Bennett*, 603 So.2d 928, 935 (Ala. 1992).

Ford argues that Sperau and Foster were educated, sophisticated businessmen and that no confidential relationship existed between the parties, or from the particular circumstances. However, a confidential relationship may arise in a commercial setting, because when a party makes a representation, he is under a duty to make a full and fair disclosure. *First Alabama Bank*, supra. Ford had superior and historical knowledge regarding the expected performance of its new dealers. Ford sought out Foster and aggressively recruited him as a dealer. Ford represented that a 65.4% sales and profit forecast was reasonable and reliable when

Ford knew that new minority dealers, as well as non-minority dealers were predicted to be loss dealers. The evidence in this case supports Ford's duty to disclose.

III.

Ford also argues that the plaintiffs signed two documents which Ford claims preclude them from establishing justifiable reliance as a matter of law. First, Foster and Sperau signed the forecast of sales and profits itself which states:

> "Forecast Sales and Profits are believed to be reasonable but cannot be guaranteed. Actual results will depend on managerial ability and future business conditions."

Second, at closing, they signed an application for sales agreement which contained this language:

> "I/we ... have determined to become an authorized dealer in [Ford] products and to make the investments necessary therefor, solely in reliance on my/our investigation and judgment of present and future conditions and expectations in my/our area and the industry and not in reliance on any statements made or documents exhibited to me/us by any representatives of Ford Motor Company, except for the following ____None___ and such other statements or documents as may be specified by me/us in writing to Ford Motor Company prior to my/out execution and submission of [the] Sales Agreement."

In *Downs* v. *Wallace*, 622 So.2d 337 (Ala. 1993) this Court considered whether an integration or merger clause made reliance on representation outside of the written agreement unjustifiable as a matter of law, as Ford contends they did in this case. In *Downs*, the purchasers of a feed and seed business brought an action against the broker and his corporation for fraud, alleging that the broker had induced them to purchase the business by misrepresenting and suppressing facts about the former ownership, the income,

and the profitability of the business. The trial judge granted summary judgment for the broker; we reversed and remanded on the grounds that the presence of an integration clause did not render the purchasers' reliance on alleged oral misrepresentations unjustifiable or unreasonable as a matter of law. We said in *Downs*:

> "Further, this Court has never held that an integration clause such as the one contained in the Downses' purchase agreement renders a party's reliance on oral representations unjustifiable, or unreasonable, as a matter of law. To the contrary, this Court has consistently held that although a written contract stipulates that there were no oral understandings not incorporated therein, such a stipulation does not foreclose a party, as a matter of law, from establishing his reliance on fraudulent representations that induced him to enter the contract." (Citations omitted.)

Id. at 341. In *Downs*, we quoted the reasoning of the Supreme Court of Massachusetts regarding the policy behind permitting a party to establish his reliance on another's fraudulent inducements, despite an integration clause in a written agreement:

> "'In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in a

> multitude of frauds and in thwarting the general policy of the law.' *Bates* [v. *Southgate*], 308 Mass. 170, at 182, 31 N.E.2d 551, at 558 (1941)...."

Downs v. *Wallace*, supra at 341-342. See: *Harris* v. *M & S Toyota*, 575 So.2d 74 (Ala. 1991); *Reynolds* v. *Mitchell*, 529 So.2d 227 (Ala. 1988).

IV.

Ford argues that there was no evidence that Sperau and Foster justifiably relied on the non-disclosure of the race-based data. However, Ford sought out Foster and aggressively recruited him as a dealer. Ford represented that a 65.4% sales and profit forecast was reasonable and reliable when it knew that new minority dealers were predicted to be loss dealers. There is ample evidence that Sperau and Foster relied upon the data provided to them by Ford, and that Ford did not disclose the race-based data, of which Ford had superior knowledge. The standard for justifiable reliance in a fraud case has been stated as follows:

> "Reliance should be assessed by the following standard: A plaintiff, given the particular facts of his knowledge, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that representation is 'one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.'"

Southern States Ford, Inc. v. *Proctor*, 541 So.2d 1081, 1091-92 (Ala. 1989) (Hornsby, C.J., concurring specially) as quoted in *Hickox* v. *Stover*, 551 So.2d 259, 263 (Ala. 1989). The question of whether Foster and Sperau justifiably relied on the projections was properly submitted to the jury. The record reflects, as the trial judge stated in his Hammond order:

> "There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama."

The jury concluded that the Plaintiffs were induced to invest in the Selma dealership based on the fraudulent misrepresentations and suppressions of material facts committed by Ford and therefore damages were due to be awarded.

V.

Ford contends that the plaintiffs failed to establish that the failure of the dealership was the proximate result of the alleged misrepresentations and suppression of material fact. The company contends that the demise of the dealership was the result of severe mismanagement. Ford claims that Sperau and Foster drained capital out of the business by using the capital to pay a wide range of personal expenses, by taking higher salaries than Ford had projected, and by paying off Foster's tax liability from an unrelated business.

The plaintiffs counter that this argument is based on an erroneous characterization of the damages decided by the jury. The plaintiffs argue that the proper jury instruction was given as follows:

> "Now in this case plaintiffs claim as compensatory damages, monies obtained from third parties and which monies are owed by them. The plaintiffs say these monies were borrowed to capitalize the Selma Ford dealership and were used in the business. In this regard, expenses incurred as a result of a fraudulent misrepresentation may be recovered. A party may recover all damages which were within the contemplation of the parties or which were necessary or natural and proximate consequences of the fraud."

Ford did not object to this instruction. It thus became the law of the case. *Marshall Durbin Farms, Inc.* v. *Landers*, 470 So.2d 1098, 1102 (Ala. 1985).

VI.

Ford also claims that even if the plaintiffs have adduced sufficient evidence to support their misrepresentation and suppression claims, the theory upon which those claims rest, conflicts with federal law and is therefore preempted under the Supremacy Clause of the United States Constitution. Ford claims that an award of damages under state common law may be subject to conflict preemption if it effectively requires behavior that would be prohibited under federal law. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Ford argues the plaintiffs' claims boil down to the contention that Ford should have inflated the capital requirement and concomitantly reduced the projected return on investment because Foster is an African-American. Ford contends that this verdict would require Ford to do precisely what 42 U.S.C. § 1981 prohibits, offer dealerships to black applicants on less favorable terms than are offered to white applicants.

We reject this contention, because it is premised upon an erroneous characterization of the verdict in this case as requiring a higher capitalization for a black dealership than a white dealership. The verdict in this case was based upon the plaintiffs' state action for fraud. The fraud claim is not preempted by federal law. In addition, Ford's preemption argument was never raised in the trial court, and thus has been waived. Federal preemption must be affirmatively pleaded in order to avoid waiver. *International Longshoremen's Ass'n* v. *Davis*, 470 So.2d 1215 (Ala. 1985).

VII.

Ford argues further that venue was not proper in Lowndes County, Alabama. In the original complaint, the plaintiffs alleged that the defendants Ford Motor Company and Ford Motor Credit Company were foreign corporations

doing business in Lowndes County, Alabama, at all times material to the averments of the complaint which included a cause of action for breach of contract. Ford Motor and Ford Credit admitted that they were foreign corporations doing business within Lowndes County in their answer to the complaint. In the first trial of this case, the trial judge granted a directed verdict for the defendants as to the contract claim. Ford contends that once this occurred, there was no contract claim to which the other claims could be "joined" to preserve venue in Lowndes County for the second trial.

There is no merit to this argument, because the question of proper venue is to be determined as of the time the action is filed. Rule 82(b)(1)(a), A.R. Civ. P.; *Ex parte Maness*, 386 So.2d 429 (Ala. 1980); *Ex parte Wilson*, 408 So.2d 94 (Ala. 1981); *Ex parte Smith*, 423 So.2d 844 (Ala. 1982); *Elmore County Com'n* v. *Ragona*, 540 So.2d 720 (Ala. 1989).

VIII.

Ford next argues that the trial court erred to reversal in admitting certain evidence by plaintiffs' economic expert, Dr. Charlie Carter. Ford specifically questions the evidence presented by Dr. Carter concerning the termination ratio for minority dealers, i.e. the percentage of black Ford dealers who went out of business. While admitting that Dr. Carter does appear to have taken the year-end numbers of minority-owned dealership directly from the EOP Reports, Ford states that Dr. Carter's figures on the number of dealers appointed each year are not in the report or other evidence introduced at the trial.

However, Ford did not preserve this issue by making a timely objection to the testimony. *Macon County Com'n* v. *Sanders*, 555 So.2d 1054, 1058 (Ala. 1990); *Mead Coated Board, Inc.* v. *Dempsey*, [Ms. 1921827, April 29, 1994] 644 So.2d. 872 (Ala. 1994). The record reflects that counsel for Ford objected to Dr. Carter's testifying in a narrative fashion,

however there was no objection to the content of his testimony. Instead, Ford conducted an extensive cross-examination of Dr. Carter and presented the testimony of Robert Sullivan, Ford's Manager of Dealer Operations for the Eastern United States, to refute the evidence Dr. Carter had presented. Ford offered into evidence a chart which was a replica of the diagram utilized in the examination of Robert Sullivan relating to Dr. Carter's figures. Four days after Dr. Carter had testified, Ford filed a hand written motion for mistrial or, in the alternative, to strike exhibit with instructions. The trial court responded to this motion by stating that the jury would be instructed concerning the weight, if any, to be given to the testimony of experts. The jury was properly instructed. Ford cannot now complain that Dr. Carter's testimony should have been excluded. *Mead Coated Board, Inc.* v. *Dempsey*, supra.

IX.

Finally, Ford contends that there was insufficient evidence to support the imposition of punitive damages, and that the award of punitive damages was excessive. Applying the principles of law this Court adopted in *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil Co.*, v. *Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989) and following the provisions of Section 6-11-23(b), Code of Ala. 1975, the trial judge held a hearing, and issued a well-prepared order, stating the reasons why he concluded that the punitive damages awarded in this case were due to be imposed and were not excessive:

> "The parties in this case were all represented by able counsel who represented their clients in a competent manner. The jury represented a fair cross section of the community based upon the factors of race, age, and gender. During the course of deliberations, the jury requested additional instructions and deliberated several hours before reaching its verdicts in favor of the Plaintiffs and Ford Motor Credit Company. The jury

was polled and each juror responded that the verdicts were their verdicts. The Court is satisfied that the jurors carried out their duties in a conscientious manner and that, except for the question of excessiveness of the mental anguish awards, the verdicts in this case were rendered by a properly functioning jury. There was no evidence before the Court of any misconduct, bias, passion, prejudice, corruption, or improper motive by the jury. The Court considers the fact that the jury returned a verdict of $635,000.00 in favor of Ford Motor Company's wholly owned subsidiary Ford Motor Credit Company, significant. It means the jury considered the law and evidence pertaining to all parties.

...

Punitive Damages

"Commencing on April 28, 1994 this Court conducted a hearing to consider the excessiveness of the $6 million punitive damages awarded in this case in accordance with *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Green Oil Co.*, v. *Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989); and the provisions of Section 6-11-23(b), Code of Alabama, 1975.

"This Court has determined that the punitive damage verdict rendered in this case is not due to bias, passion, prejudice, corruption, or other improper motive. Notwithstanding the fact that an award of punitive damages is made by a properly functioning jury, it may nevertheless be excessive if it exceeds the amount necessary to accomplish the purposes of punitive damages. The purpose of a punitive damage award is not to compensate the Plaintiffs but the focus is on punishing the wrongdoer and deterring others from committing similar wrongs in the future. *Green Oil*, *supra*, 539 So.2d at 222. Ford contends that the punitive

damage award in this case exceeds the amount necessary to accomplish these purposes.

"The issue to be decided, then, is whether under the facts of this case the punitive damage award of $6 million exceeds an amount that will punish the defendant and deter the Defendant and others from committing similar wrongs in the future. The constitutional protection of the jury's award of punitive damages may only be disturbed if it is so excessive or out of proportion to the wrong committed by the Defendant as to violate the Defendant's rights not to be deprived of property without due process of law. *Henderson* v. *Alabama Power Company*, 627 So.2d 878, 893 (Ala. 1993).

"The Alabama Supreme Court and the Legislature have identified several non-exclusive factors which this Court may consider bearing on the question of the excessiveness of a punitive damages award. In considering these factors it is the decision of this Court that a punitive damages award of $6 million in this case is not excessive. In making its decision this Court has considered each of the numerous factors suggested by the Alabama Supreme Court in its decisions and the Alabama Legislature in its statute. The Court has also considered the United States Supreme Court's recent decisions in *Haslip* and *TXO* considering pertinent factors. In accordance with the procedure established in *Hammond*, the reasons for declining to disturb the jury's punitive damage award are stated hereinafter.

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs due to the Defendants'

fraudulent conduct and its duration supports the jury's punitive damages award in this case.

"There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstances similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

"This Court has considered the issue of the impact of the punitive damages verdict on innocent third parties. Ford emphasizes its good intentions in recruiting black dealer candidates to participate in its Minority Dealer Program. Ford suggests that the punitive damages verdict in this case will have a detrimental effect on this Program and those participating now in the Program and those candidates who would participate in the Program in the future. During the *Hammond* hearing, this Court heard testimony from the Ford executive responsible for the Minority Dealer Program that to provide negative information to black dealer candidates would discourage their participation in Ford's Program.

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer

candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers.

"Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. This Court is also not persuaded that Ford's only alternative to suits of this nature is to stop its minority program. Disclosure of the failure rate of "all" new dealers along with a disclosure of the cyclical nature of the business would certainly be a start toward correcting the problems complained of here.

"Another of the factors to be considered is whether the Defendant profited or received a benefit from its misconduct. Ford derived a substantial benefit from its recruitment of black dealer candidates including the Plaintiffs. Ford management stated in the October, 1987 Equal Opportunity Progress Report that i[t]s black dealerships had sales of Ford products amounting to $1 billion. The corporate benefit of the black dealer body in dollars to Ford is significant. The Plaintiffs point out that River City Ford sold approximately $15 million in Ford products. They also maintain that the black dealer program provided Ford the added benefits of positive corporate image and a means of keeping dealerships in less desirable geographic locations in business.

"Ford's 1993 Form 10-K indicates that Ford Motor Company had an annual net income of approximately $2.5 billion for 1993 and assets approaching $200 billion. Additionally, Ford management testified during the *Hammond* hearing that the $ 6 million punitive damages award will have no effect on Ford's continued

operation. This Court also notes that the United States Supreme Court affirmed a punitive damages award of a West Virginia jury in the amount of $10 million against *TXO*. In *TXO* the Plaintiff estimated that TXO had a net worth of between $2.2 billion and $2.5 billion, a net worth equivalent to Ford Motor Company's net income for 1993. *TXO Production* v. *Alliance Resources*, 125 L.Ed.2d 366, 374 n.9 (1993).

"A $6 million punitive damages verdict against Ford Motor Company is not excessive under the facts of this case, given the financial position of Ford Motor Company. This is particularly so when the $ 6 million punitive damage award in this case is compared to larger punitive damages awards affirmed by the Alabama Supreme Court in similar fraud cases against corporate defendants which do not have either the assets or income of Ford Motor Company.

"Another factor considered in sustaining the jury's punitive damages award in the Plaintiffs' costs of litigation. Plaintiffs expended considerable resources in time and money to prepare and try this case. A reduction of the jury's punitive damages award in this case would discourage plaintiffs undertaking such litigation due to the substantial costs required."

We adopt the well reasoned *Hammond* Order of the trial judge as our own. The trial judge has weighed the factors previously set forth by this Court and by the Alabama legislature and has determined that a punitive damages award of $6 million in this case is not excessive. In addition, at the *Hammond* hearing, the plaintiffs presented Ford's Form 10-K filed with the Securities and Exchange Commission for the year ending December 21, 1993, as evidence of the economic impact of the verdict on Ford. The Ford Form 10-K shows that for the year ending 1993, Ford Motor Company had total assets of $198 billion, and the automobile division of Ford realized a net income of $940 million. The presumption of

correctness of a jury verdict, extends to the jury's punitive damage award. *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala.1991).

X.

We now consider the plaintiffs' appeal in this case. First, the plaintiffs aver that the trial court erred in directing a verdict in favor of Ford Motor Credit Company and Ford Motor Company on the plaintiffs' contract claim. Ford contends that the plaintiffs cannot raise this issue as to Ford Motor Company, because their notice of appeal from the directed verdict names only "FMCC" or Ford Motor Credit Company. We agree. It is settled law that notice of appeal from a judgment in favor of two or more parties must specifically name each party whose judgment the appellant wishes to overturn. Rule 3(c), A.R.App. P.; *Edmondson* v. *Blakey*, 341 So.2d 481 (Ala. 1976); *Threadgill* v. *Birmingham Board of Education*, 407 So.2d 129, 132 (Ala. 1981) quoting *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.1981), *cert. denied*, 454 U.S. 1125 (1981).

XI.

Next, we consider the claims of plaintiffs Chandra Foster and Diane Sperau, the wives of Sam Foster II and Dee-Witt Sperau. The wives claim that, as a result of Ford's misrepresentations, they signed personal guaranties for the capital loan and the floor plan funds extended by Ford Credit. The wives appeal from the entry of summary judgment in favor of Ford Motor Company and Ford Motor Credit on their claims. The record reflects that the trial judge submitted Ford Credit's counterclaim on its guaranties to the jury, instructing it as follows:

> "If you are reasonably satisfied from the evidence that Dee-Witt Sperau, Diane Sperau and Samuel R. Foster, II, were induced by fraud, as defined to you by the court, to enter into the promissory notes and guarantees

> made the basis of Ford Motor Credit Company's counterclaim and that they were damaged or will suffer damage in the future therefrom, then Dee-Witt Sperau, Diane Sperau and Samuel R. Foster are not liable on the counterclaim and you should so find."

The jury rendered a verdict in favor of Ford Credit on its counterclaim and assessed damages in the amount of $635,000.00, thus necessarily finding that Ford Credit had not committed fraud on either the husbands or the wives with respect to the guaranties. Thus, the verdict is res judicata as to these claims.[5] *Turner* v. *Green*, 571 So.2d 1104, 1106 (Ala. 1990).

XII.

Finally, we consider Foster and Sperau's cross-appeal contending that the trial court erred in granting a remittitur of the jury's award to them for mental anguish. In his order of June 19, 1994, the trial judge granted a remittitur of Sperau's mental anguish award from $1 million to $200,000 and of Foster's mental anguish award from $2.5 million to $500,000, stating as follows:

> "The jury awarded damages for mental anguish to Samuel R. Foster, II, in the amount of $2,500,000.00. The jury returned a verdict awarding damages for mental anguish in favor of Dee-Witt C. Sperau in the amount of $1,000,000.00. The jury heard testimony of the Plaintiffs, Plaintiffs' wives, and Plaintiff Foster's father which related to the Plaintiff's humiliation, shame and wounded pride. There was some additional evidence before the jury from which it could be inferred that Plaintiff Foster's humiliation and shame would be greater than Plaintiff Sperau's because of his reputation, and because of additional family relationships being affected.

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[5] Ford Credit Company released Chandra Foster from the guaranty.

Neither Plaintiff presented evidence of any need for counseling or mental health care or that either Plaintiff was unable to cope with the stress and grief resulting from their situation. No evidence was presented from any expert or healthcare professional that either Plaintiff was suffering from a serious emotional disorder as a result of their experiences.

"Plaintiffs wish to rely on the fact that substantial amounts of monies were involved which justify the enormous award for mental anguish. This court does not believe the amount of money involved is the guiding factor in determining the amount of mental anguish, rather the feelings and mental condition of the Plaintiff should be [a] guiding factor. Indeed, the loss of a single weekly or monthly paycheck to a person of insubstantial means may cause as much mental anguish as a multi-million dollar loss would to one of substantial means. Also, a person of substantial means, with a good education, and with broad business experience may be better able to handle the frustration than one who was not so educated and experienced. This Court also notes that there were other factors in evidence which could have exerted a certain amount of mental suffering on these Plaintiffs which was unrelated to the actions of the Defendants.

"These Plaintiffs filed suit three months after River City Ford closed its doors and in view of the scant evidence of mental anguish or suffering by both Plaintiffs, the award totalling $3.5 million for mental anguish are excessive and should be remitted. This court considers that a remittitur of excessive damages for mental anguish by this court is warranted and justified by similar action taken by the Supreme Court of Alabama on compensatory damage awards involving mental anguish in the cases of *Sears, Roebuck and Co.* v. *Harris*, 630 So.2d 1018, 1034 (Ala. 1993) and *Foster* v. *Life*

Insurance Co., __ So.2d __, 28 A.B.R. 1152 (Ala. Jan. 14, 1994).

> "In short, the Court is shocked by the size of the verdicts for mental anguish in view of the evidence presented at trial. This Court considers $100,000.00 would be adequate for Sperau and $250,000.00 would be adequate for Foster. However, the Court considers that a properly functioning jury could have awarded a maximum of $200,000.00 for mental anguish to Plaintiff Sperau and a maximum of $500,000.00 for mental anguish to Plaintiff Foster.
>
> ..."

This Court has said that the trial court has much discretion in determining whether to grant a new trial and to require a remittitur of damages for mental anguish. *Crown Life Ins. Co.* v. *Smith*, [Ms. 1930120 (August 5, 1994)] __ So.2d __ (Ala. 1994):

> "The trial court has much discretion in determining whether to grant a new trial and, in that regard, whether to require a remittitur. *Fields* v. *Parker*, 361 So.2d 356 (Ala.1978). Given that discretion, the trial court's ruling on a new trial motion is presumed to be correct. *Todd* v. *United Steelworkers of America*, 441 So.2d 889 (Ala.1983); *Birmingham Electric Co.* v. *Thompson*, 251 Ala. 465, 37 So.2d 633 (1948)."

Id. While recognizing that "there is [no] yardstick to measure the amount of recompense which should be awarded for ... mental suffering," *Birmingham Elec. Co.*, 251 Ala. at 466, 37 So.2d at 634, the trial judge has carefully reviewed the evidence presented by the plaintiffs concerning their claim for mental anguish. We find no abuse of discretion on his part in remitting these two awards for mental anguish, based upon the evidence before him.

Based on the foregoing, we are of the opinion that the judgment of the trial court, including the damages award, and the remittitur of the damages for mental anguish, is due to be, and it hereby is, affirmed.

AFFIRMED.

ALMON, SHORES, KENNEDY, INGRAM, COOK, and BUTTS, JJ., concur.

MADDOX and HOUSTON, JJ., dissent.

HOUSTON, Justice (dissenting).

I am concerned about the effect on the vision of this nation of the tort theories advanced by the plaintiffs in this case-(1) the fact that a person is a member of a racial minority impairs that person's ability to compete, and (2) that businesses that offer minorities the opportunity to compete without disclosing that alleged racial handicap can be liable for compensatory and punitive damages if a member of that minority enters a business and fails.

I am concerned because I do not believe that a person's race impairs his ability to compete, and if we base tort liability on this false premise, we "attempt the Future's portal with the Past's blood rusted key."[6]

Mel Farr, chairman of the Ford Lincoln-Mercury Black Dealers Association, testified in this case that qualified minority applicants should have "an opportunity to participate in the ... free enterprise system that says you have the right to fail and you have the right to succeed." Farr further testified that, in his opinion, it is insulting to suggest that race has anything to do with that success or failure in a business venture.

There are tens of thousands of franchised new car dealerships in this country that generate hundreds of billions

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[6] James Russell Lowell, The Present Crisis.

of dollars of annual sales. The automobile industry, through its franchises, is a major source of small business opportunities in this country. I am concerned that the jury verdict in this case could have a significant negative impact on this country's efforts to make "equal opportunity" a reality of the American economy.

However, this is a dissenting opinion; and there was evidence that certain Ford employees represented to the plaintiffs that sales and profit forecasts for the existing Selma Ford dealership that the plaintiffs had purchased were reasonable, and suppressed or misrepresented the capitalization requirements needed to acquire and successfully operate the existing dealership (*Rodopoulos* v. *Sam Piki Enterprises, Inc.*, 570 So.2d 661 (Ala.1990)). Therefore, without further discussion of whether the defendant had any initial legal liability based upon the theories expressed in the first paragraph of this dissent, I address the issue of punitive damages.

In *Henderson* v. *Alabama Power Co.*, 627 So.2d 878 (Ala.1993), a majority of this Court held that the legislation that imposed a $250,000 cap on punitive damages (Ala. Code 1975, § 6-11-21) violated the right to trial by jury guaranteed by § 11 of the Constitution of Alabama of 1901. In my dissent, I wrote:

> "However, if the trial court is the trier of the facts, then punitive damages cannot exceed $250,000 unless the punitive damages award is based on one of the three exceptions listed in [Ala.Code 1975,] s 6-11-21, because clearly what the trial court does as trier of the facts is in no way affected by s 11 of the Constitution....
>
> "The people spoke through their legislature in 1987. The people spoke after all sides had been heard. The best and the brightest advocated or opposed a fixed limitation on punitive damages. What is now § 6-11-21 was legally adopted by a duly elected legislature, and it was

> approved by a duly elected governor. This was representative democracy at work. If excessiveness of a punitive damages award is raised, should not I, as an appellate court judge, treat $250,000 as the outer limit of what society deems necessary in the way of punishment and deterrence for civil wrongs (except those for which the limit was not made applicable). As the author of *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989), I believe that a $250,000 limitation should be factored into the *Green Oil Co.* standard of review. The legislature can by general act change rules adopted by this Court. Section 6.11, of Amendment 328, Alabama Constitution."

627 So.2d at 914.

Subsequently, the United States Supreme Court in *Honda Motor Co., Ltd.* v. *Oberg*, ___ U.S. ___, ___, 114 S.Ct. 2331, 2342 (1994), held: "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." Honda further provided: " ' "[P]rocedural due process" requires judicial review of punitive damages awards for reasonableness....' " ___ U.S. at ___, 114 S.Ct. at 2335, quoting *TXO Production Corp.* v. *Alliance Resources, Corp.*, 509 U.S. , 113 S.Ct. 2711 (1993); and, in effect, held that a 1910 amendment to the Oregon Constitution, which prohibited judicial review of the amount of punitive damages awarded by a jury unless the Court could affirmatively say there was no evidence to support the verdict, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Who sets the outer limit of reasonableness of a punitive damages award? In cases such as the case before us there is a legislative pronouncement that "[a]n award of punitive damages shall not exceed $250,000." See § 6-11-21. When the legislature has set a maximum punitive damages award that may be imposed upon a defendant in a case, can the

judiciary, in accordance with the Due Process Clause of the Fourteenth Amendment, ignore that legislative mandate? Can the judiciary, in accordance with the Equal Protection Clause of the Fourteenth Amendment, enforce $250,000 as the outer limit of reasonableness on punitive damages awarded by a trial judge in a case tried without a jury, but ignore that outer limit of reasonableness in its review of jury verdicts? If the judiciary does ignore that outer limit of reasonableness in the review of jury verdicts, would this not subject § 11 of the Alabama Constitution to constitutional challenge under the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution?

It is the basic function of the legislature to establish this state's public policy. See *Almon* v. *Morgan County*, 245 Ala. 241, 245, 16 So.2d 511, 514 (1944) ("the Legislature prescribes the State's policy; the courts do not"). See, also, *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 9-10, 18 So.2d 810, 815 (1944), *cert. dismissed*, 325 U.S. 450 (1945).

Historically the power to punish for criminal behavior in this country has rested in elected legislative bodies.

> "The power to prescribe the penalty to be imposed for [the] commission of a crime rests with the legislature, not with the courts. This power is not a special grant or limited authority; it is part of the sovereign power of the state to maintain social order and to take life and liberty and the rights of both when necessary. As the Supreme Court has stated, whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.
>
> "The power of a legislative body with respect to punishment for crime is practically unlimited, and is controlled only by constitutional provisions. Subject to this qualification, the legislature may fix the punishment

> for crime as it sees fit, and where a particular punishment is prescribed, no other may be imposed."

21 Am.Jur.2d *Criminal Law* § 589 (1981). See, also, *Rummel* v. *Estelle*, 445 U.S. 263 (1980); *Albernaz* v. *United States*, 450 U.S. 333 (1981); *Jones* v. *Thomas*, 491 U.S. 376 (1989). In Alabama, the legislature sets the punishment for criminal offenses. See Ala. Code 1975, §§ 13A-5-6, -7, -9, - 11, -12, -13, and -39 et seq; see, also, *Ex parte Giles*, 632 So.2d 577 (Ala. 1993), cert. denied, 114 S.Ct. 2694 (1994). In fulfilling this function, in accordance with Article I, § 35, of the Alabama Constitution of 1901, the legislature determines the extent to which the state can be allowed to deprive a person convicted of a criminal offense of his property, including a person convicted of the most egregious criminal act. By way of example, a person convicted of a class A felony, such as murder under § 13A-6-2, may be fined an amount not exceeding $20,000, or "[a]ny amount not exceeding double the pecuniary gain to the defendant or loss to the victim caused by the commission of the offense." Section 13A-5-12(a)(1) and (a)(4). In Alabama, juries imposed fines and fixed sentences at the time of the ratification of the Constitution of Alabama of 1901. If a jury imposed a fine in excess of the legislatively prescribed maximum fine, would this not have been a violation of the Due Process Clause of the Fourteenth Amendment? Subsequent to the ratification of the Constitution of 1901, the legislature removed from the jury the right to impose fines and to fix sentences and empowered the trial court to do so. If a trial court were to impose a fine in a criminal case in excess of that prescribed in the sections of the Code cited above, would this not violate due process under the Fourteenth Amendment? If an appellate court should affirm a judgment imposing such a fine, would that not violate due process under the Fourteenth Amendment?

"A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power

that must comply with the Due Process Clause of the Fourteenth Amendment." (Emphasis added.) *Honda*, ___ U.S. at ____, 114 S.Ct. at 2342. In fulfilling its policy-making role on the civil side of the law, the legislature has determined that $250,000 is the maximum "reasonable" amount of punitive damages that should be awarded in fraud cases, such as the present one, where no pattern or practice of wrongful conduct has been shown. § 6-11-21. A majority of this Court in Henderson, supra, held that § 6-11-21 was unconstitutional under Article I, § 11, of the Alabama Constitution of 1901, to the extent that it set a limit on the amount of punitive damages that could be awarded by a jury in a particular case. I am aware of no decision from this Court holding that the expression of policy set out by the legislature in § 6-11-21 violates the separation of powers provision of the Alabama Constitution of 1901, Article III, § 43.[7] Therefore, in cases where the trial court acts as the factfinder, punitive damages cannot exceed $250,000, unless the punitive damages award is based on one of the three exceptions listed in § 6-11-21, because clearly what the trial court does as a factfinder is in no way affected by § 11 of the Alabama Constitution. Thus, the $250,000 statutory limit is no less a viable expression of this state's public policy following *Henderson*. This Court, in its exercise of supervisory appellate jurisdiction over jury verdicts, is bound by the Fourteenth Amendment and Article VI (the Supremacy Clause) of the United States Constitution to conduct a "meaningful" review of jury verdicts awarding punitive damages. This Court simply cannot fulfill this constitutionally mandated responsibility without recognizing that the legislature, acting within its policy-making power, has determined that $250,000 is the maximum reasonable amount

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[7] By mentioning this, I do not mean to suggest that § 6-11-21 in any way violates Article III, § 43, of the Constitution.

of punitive damages that should be awarded in fraud cases like this one.

From my perspective as an Associate Justice of the Supreme Court of Alabama, and after struggling many years to bring some "rhyme or reason" to the process by which punitive damages awards are reviewed on appeal, I have concluded that it is a violation of the Fourteenth Amendment for this Court, in attempting to fulfill its constitutionally mandated responsibility of conducting a meaningful review of punitive damages awards, to ignore the public policy of this state expressed in § 6-11-21, and to affirm an award of punitive damages in excess of $250,000, when none of the exceptions listed in § 6-11-21 apply. Justice Hugo Black, writing for a majority of the Court in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966), noted that "one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." In my view, the majority's decision here is no less objectionable under the Fourteenth Amendment than would be a decision from this Court, or from the Court of Criminal Appeals, upholding punishment in a criminal case in excess of the legislatively prescribed punishment for the offense charged. See *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).

Time and again this Court has held that a plaintiff has no right to punitive damages. See, e.g., *Meighan* v. *Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775 (1910); *Comer* v. *Age-Herald Publishing Co.*, 151 Ala. 613, 44 So. 673 (1907). Therefore, in addressing punitive damages, "the sole object and only legitimate end of [both the legislative and judicial departments of] government is to protect" the property interests of civil defendants in cases where punitive damages are sought; and when the judicial department ignores legislative policy with respect to the outer limit of punitive damages that can be awarded in tort cases, it has exceeded the "sole object and only legitimate end of

government," and, in accordance with Article I, § 35, of the Constitution, it has engaged in "usurpation and oppression."

For the foregoing reasons, I respectfully dissent from that portion of the majority opinion affirming the jury's award of punitive damages in the amount of $6,000,000. I would remit the punitive damages award to $250,000, in accordance with the established policy of this state.

MADDOX, J., concurs.

IN THE CIRCUIT COURT OF
LOWNDES COUNTY, ALABAMA

DEE-WITT C. SPERAU, et al.,	*	
Plaintiffs,	*	
v.	*	CASE NO. CV-91-34
	*	
FORD MOTOR COMPANY, et al.,	*	
Defendants.	*	

ORDER

This case comes before the Court on the post-trial motions of the parties arising from a jury verdict rendered on February 24, 1994 in favor of the Plaintiffs against the Defendant, Ford Motor Company. On February 28, 1994 Plaintiffs filed their Motion for Punitive Damages hearing; on March 2, 1994; this Court entered judgments on the jury verdicts; and on March 31, 1994, the Defendant, Ford Motor Company, filed its Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, Motion for Remittitur of Damages, and Motion for Review of Punitive Damages Award.

Ford's post-verdict motions challenge the validity of the jury verdicts; therefore, this Court must determine whether Ford is entitled to judgment nothwithstanding the verdict or a new trial based upon the facts of this case and the grounds stated by Ford in its post-trial motions. *Fuller* v. *Preferred Risk Life Insurance Company* 577 So.2d 878, 883-885 (Ala. 1981). In the event Ford is not entitled to judgment notwithstanding the verdict or new trial, Ford seeks a remittitur of compensatory and punitive damages awarded by the jury in favor of Plaintiffs and against the Defendant.

These motions were all heard by this Court on May 28th and 29th of 1994 and evidence was presented at that time in connection with the punitive damages award. The parties

have also submitted excellent briefs and arguments to the Court for consideration on all matters, submitted to it. At the hearing this Court reserved its ruling on the admissability in the *Hammond* hearing of the trial testimony of Emmett Mitchell and Carvel Simmons from a former trial in this case. The Court upon consideration thereof has determined that such testimony is inadmissable and has not considered the testimony for any purpose.

The Plaintiffs requested a trial by jury of the issues in this case at the time they filed their Complaint. The right to a trial by jury is guaranteed under Alabama law by Article I, Section 11 of the Alabama Constitution of 1901. This constitutionally protected right applies both to the jury's determination of liability and also to the fixing of damages.

This Court was not the fact finder in this case but rather the jury was instructed and performed its duty to determine what the true facts were. This Court does not necessarily agree with all the factual findings of the jury, nor is it required to do so. Indeed, this Court may well have determined otherwise than did the jury concerning both the fraud claim and the suppression claim on which this case went to the jury. However, based upon a consideration of the law applicable to the Plaintiffs' claims, the evidence presented in the trial of this case, the grounds stated in Ford's Motion for Notwithstanding the Verdict and Motion for New Trial, and the arguments of the parties, it is the determination of this Court that with the exception of the question of remittitur which are separately addressed hereafter, Ford's Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial are due to be denied.

Due to the aforementioned determination, this Court must now consider the issue of excessiveness of damages awarded by the jury in this case. In its Motion for Remittitur of Damages, Ford contends that the jury's award for mental anguish is excessive. As to the punitive damages, Ford maintains that the punitive damages award is excessive and

was due to bias, passion, prejudice, corruption or other improper motive and that the award exceeds the amount necessary to deter and punish.

The parties in this case were all represented by able counsel who represented their clients in a competent manner. The jury represented a fair cross section of the community based upon the factors of race, age, and gender. During the course of deliberations, the jury requested additional instructions and deliberated several hours before reaching its verdicts in favor of the Plaintiffs and Ford Motor Credit Company. The jury was polled and each juror responded that the verdicts were their verdicts. The Court is satisfied that the jurors carried out their duties in a conscientious manner and that, except for the question of excessiveness of the mental anguish awards, the verdicts in this case were rendered by a properly functioning jury. There was no evidence before the Court of any misconduct, bias, passion, prejudice, corruption, or improper motive by the jury. The Court considers the fact that the jury returned a verdict of $635,000.00 in favor of Ford Motor Company's wholly owned subsidiary Ford Motor Credit Company, significant. It means the jury considered the law and evidence pertaining to the all parties.

Mental Anguish

The authority of this Court to grant remittitur pursuant to Alabama Rules of Civil Procedure, 59(f), depends upon the holding that the presumption of correctness of the jury verdict has been overcome by a clear showing that the amount of the verdict is excessive. In considering the excessiveness of the verdict, each case is determined on its own facts and the Court may not substitute its judgment for that of the jury. *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989), *City Bank of Alabama* v. *Eskridge*, 521 So. 2d 931 (Ala. 1988, and *Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). A jury's verdict must be within the bounds of reason, as perceived by the judicial mind, although it may exceed, or

be less than, what any particular judge's life experience would have it be. *Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993).

The jury awarded damages for mental anguish to Samuel R. Foster, II, in the amount of $2,500,000.00. The jury returned a verdict awarding damages for mental anguish in favor of Dee-Witt C. Sperau in the amount of $1,000,000.00. The jury heard testimony of the Plaintiffs, Plaintiffs' wives, and Plaintiff Foster's father which related to the Plaintiff's humiliation, shame, and wounded pride. There was some additional evidence before the jury from which it could be inferred that Plaintiff Foster's humiliation and shame would be greater than Plaintiff Sperau's, because of his reputation, and because of additional family relationships being affected. Neither Plaintiff presented evidence of any need for counseling or mental health care or that either Plaintiff was unable cope with the stress and grief resulting from their situation. No evidence was presented from any expert or healthcare professional that either Plaintiff was suffering from a serious emotional disorder as a result of their experiences.

Plaintiffs wish to rely on the fact that substantial amounts of monies were involved which justify the enormous award for mental anguish. This Court does not believe the amount of money involved is the guiding factor in determining the amount of mental anguish, rather the feelings and mental condition of the Plaintiff should be guiding factor. Indeed, the loss of a single weekly or monthly paycheck to a person of insubstantial means may cause as much mental anguish as a multi-million dollar loss would to one of substantial means. Also, a person of substantial means, with a good education, and with broad business experience may be better able to handle the frustration than one who was not so educated and experienced. This Court also notes that there were other factors in evidence which could have exerted a certain amount of mental suffering on these Plaintiffs which was unrelated to the actions of the Defendants.

These Plaintiffs filed suit three months after River City Ford closed its doors and in view of the scant evidence of mental anguish or suffering by both Plaintiffs, the awards totalling $3.5 million for mental anguish are excessive and should be remitted. This court considers that a remittitur of excessive damages for mental anguish by this court is warranted and justified by similar action taken by the Supreme Court of Alabama on compensatory damage awards involving mental anguish in the cases of *Sears, Roebuck and Co.* v. *Harris*, 630 So. 2d 1018, 1034 (Ala. 1993) and *Foster* v. *Life Insurance Co.*, _____ So. 2d _____, 28 A.B.R. 1152 (Ala. Jan. 14, 1994).

In short, the Court is shocked by the size of the verdicts for mental anguish in view of the evidence presented at the trial. This Court considers $100,000.00 would be adequate for Sperau and $250,000.00 would be adequate for Foster. However, the Court considers that a properly functioning jury could have awarded a maximum of $200,000.00 for mental anguish to Plaintiff Sperau and a maximum of $500,000.00 for mental anguish to Plaintiff Foster.

Punitive Damages

Commenting on April 28, 1994 this Court conducted a hearing to consider the excessiveness of the $6 million punitive damages awarded in this case in accordance with *Hammond* v. *City of Gadsden*, 493 So. 2d 1374, (Ala. 1986); *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-224 (Ala. 1989); and the provisions of Section 6-11-23(b), *Code of Alabama*, 1975.

This Court has determined that the punitive damage verdict rendered in this case is not due to bias, passion, prejudice, corruption, or other improper motive. Notwithstanding the fact that an award of punitive damages is made by a properly functioning jury, it may nevertheless be excessive if it exceeds the amount necessary to accomplish the purposes of punitive damages. The purpose of a punitive

damage award is not to compensate the Plaintiffs but the focus is on punishing the wrongdoer and deterring others from committing similar wrongs in the future. *Green Oil*, supra, 539 So. 2d at 222. Ford contends that the punitive damage award in this case exceeds the amount necessary to accomplish these purposes.

The issue to be decided, then, is whether under the facts of this case the punitive damage award of $6 million exceeds an amount that will punish the Defendant and deter the Defendant and others from committing similar wrongs in the future. The constitutional protection of the jury's award of punitive damages may only be disturbed if it is so excessive or out of proportion to the wrong committed by the Defendant as to violate the Defendant's rights not to be deprived of property without due process of law. *Henderson* v. *Alabama Power Company*, 627 So. 2d 878, 893 (Ala. 1993).

The Alabama Supreme Court and the Legislature have identified several non-exclusive factors which this Court may consider bearing on its question of the excessiveness of a punitive damages award. In considering these factors it is the decision of this Court that a punitive damages award of $6 million in this case is not excessive. In making its decision this Court has considered each of the numerous factors suggested by the Alabama Supreme Court in its decisions and the Alabama Legislature in its statute. The Court has also considered the United States Supreme Court's recent decisions in *Haslip* and *TXO* considering pertinent factors. In accordance with the procedure established in *Hammond*, the reasons for declining to disturb the jury's punitive damage award are stated hereinafter.

There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs

due to the Defendants' fraudulent conduct and its duration supports the jury's punitive damages award in this case.

There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstances similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

This Court has considered the issue of the impact of the punitive damages verdict on innocent third parties. Ford emphasizes its good intentions in recruiting black dealer candidates to participate in its Minority Dealer Program. Ford suggests that the punitive damages verdict in this case will have a detrimental effect on this Program and those participating now in the Program and those candidates who would participate in the Program in the future. During the *Hammond* hearing, this Court heard testimony from the Ford executive responsible for the Minority Dealer Program that to provide negative information to black dealer candidates would discourage their participation in Ford's Program.

There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board

of Directors that it expected these same new black dealer candidates would be black loss dealers.

Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. This Court is also not persuaded that Ford's only alternative to suits of this nature is to stop its minority program. Disclosure of the failure rate of "all" new dealers along with a disclosure of the cyclical nature of the business would certainly be a start toward correcting the problems complained of here.

Another of the factors to be considered is whether the Defendant profited or received a benefit from its misconduct. Ford derived a substantial benefit from its recruitment of black dealer candidates including the Plaintiffs. Ford management stated in the October, 1987 Equal Opportunity Progress Report that is black dealerships had sales of Ford products amounting to $1 billion. The corporate benefit of the black dealer body in dollars to Ford is significant. The Plaintiffs point out that River City Ford sold approximately $15 million in Ford products. They also maintain that the black dealer program provided Ford the added benefits of positive corporate image and a means of keeping dealerships in less desirable geographic locations in business.

Ford's 1993 Form 10-K indicates that Ford Motor Company had an annual net income of approximately $2.5 billion for 1993 and assets approaching $200 billion. Additionally, Ford management testified during the *Hammond* hearing that the $6 million punitive damages award will have no effect on Ford's continued operation. This Court also notes that the United States Supreme Court affirmed a punitive damages award of a West Virginia jury in the amount of $10 million against TXO. In *TXO* the Plaintiff estimated that TXO had a net worth of between $2.2 billion and $2.5 billion, a net worth equivalent to Ford Motor Company's net

income for 1993. *TXO Production* v. *Alliance Resources*, 125 L. Ed. 2d 366, 374 n.9 (1993).

A $6 million punitive damages verdict against Ford Motor Company is not excessive under the facts of this case, given the financial position of Ford Motor Company. This is particularly so when the $6 million punitive damage award in this case is compared to larger punitive damages awards affirmed by the Alabama Supreme Court in similar fraud cases against corporate defendants which do not have either the assets or income of Ford Motor Company.

Another factor considered in sustaining the jury's punitive damages award is the Plaintiffs' costs of litigation. Plaintiffs expended considerable resources in time and money to prepare and try this case. A reduction of the jury's punitive damages award in this case would discourage plaintiffs undertaking such litigation due to the substantial costs required.

Based on the foregoing, it is ORDERED:

1. Ford's Motion for Judgment Notwithstanding the Verdict is DENIED;

2. Ford's Motion for New Trial is DENIED;

3. However, the Court grants a new trial unless the Plaintiffs accept a remittitur as to the mental anguish award, to $200,000.00 for Sperau and $500,000.00 for Foster;

4. Under the *Hammond - Green Oil* factors, the Court concludes that the amount of punitive damages awarded are presumptively correct and Ford's Motion for Remittitur with respect thereto is DENIED; and

5. Ford Motor Credit Company's judgment against Sperau, Foster, and Ms. Sperau, which Plaintiffs have not challenged, is not affected by these rulings.

DONE this the 29 day of June, 1994.

/s/
H. Edward McFerrin
CIRCUIT JUDGE

IN THE SUPREME COURT OF ALABAMA
August 18, 1995

1931473

Dee-Witt C. Sperau, et al. v. Ford Motor Company, et al. (Lowndes: CV-91-34)

1931591

Ford Motor Company v. Dee-Witt Sperau and Samuel R. Foster, II.
(Lowndess: CV-91-34)

1931629

Dee-Witt C. Sperau and Samuel R. Foster, II v. Ford Motor Company. (Lowndes: CV-91-34)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM - Almon, Shores, Kennedy, Ingram, Cook and Butts, JJ., concur;
Maddox and Houston, JJ., dissent.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 18 day of Aug., 1995.

/s/
Clerk, Supreme Court of Alabama

Rule 29.6 STATEMENT

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%:

Autolatina America, Inc.
Ford Holdings
Great Mall of the Bay Area Management Company

Argentina
- Autolatina Argentina S.A.
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil
- Apolo - Administradora de Bens S/C Ltda.
- Autolatina S.A.

Canada
- Ford Motor Company of Canada, Limited
- TCG, International

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft & Co. Leasing KG

Holland
- Ford Nederland B.V.

Netherlands
- Ford Credit B.V.

Norway
- Ford Motor Norge A.S.

New Zealand
- Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

South Africa
South African Motor Corporation, Ltd. (SAMCOR)

Sweden
Ford Motor Company Aktiebolag

Switzerland
Ford Motor Company (Switzerland) S.A.y

Supreme Court, U.S.
FILED
DEC 1 1995
CLERK

No. 95-771

In The

Supreme Court of the United States

October Term, 1995

FORD MOTOR COMPANY,

Petitioner,

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Dee-Witt C. Sperau ("Mr. Sperau") and Samuel R. Foster, II ("Mr. Foster"), respectfully submit this brief in opposition to the petition of Ford Motor Company ("Ford") for a writ of *certiorari* to review the judgment of the Supreme Court of Alabama in this case.

STATEMENT OF THE CASE

The trial court and the Supreme Court of Alabama held that the $6 million punitive damages award against Ford in this case was not excessive after reviewing the award in accordance with the procedures established by the Supreme Court of Alabama in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. (1989), and approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991).[1] Pertinent evidence supporting the jury's verdict in this case will be summarized in the discussion which follows:

1. In December 1984 Ford management committed to have 320 black dealers by year-end 1989 – a goal described by Ford as "extremely aggressive". (R. 1931; C. 2005-2008, 4679-4682).[2] In order to accomplish this

[1] The facts upon which this case was decided by the Supreme Court of Alabama are recited in the opinion reproduced in Petitioner's Appendix at pages 1a through 42a.

[2] The designation "R. ___" refers to the Reporter's Transcript of the trial below. The designation "C. ___" refers to the Clerk's Record, which is comprised of pleadings, motions, briefs, and trial exhibits.

extremely aggressive goal, district managers were assigned objectives for their particular sales district and this became a factor in performance evaluations of Ford executives in the various sales districts, including specifically the evaluations of district sales managers and market representation managers. (R. 825, 899, 912-913, 921, 1448).

2. Based upon historical experience, Ford management knew that a substantial disparity existed in the profitability of black dealerships compared to non-minority dealerships. The return on guide investment for black dealerships compared to white dealerships was substantially lower, whereas the percentage of black dealers in a loss position was considerably higher when compared to white dealers for the period 1984 through 1987, and after. (C. 4676, 4687, 4709, 4738, 5305, 5326). As early as October 1985 Ford management knew that "[t]he more profitable dealers have generally been in business longer, all over two years, and are our most experienced." (C. 4687, 4710). In addition to the black dealers' lack of retail management experience, "higher fixed costs" was another factor identified by Ford contributing to the differences in performance of black dealers in comparison to white dealers. (C. 4711). These fixed costs included higher interest costs, floor plan expense, rents, depreciation and insurance costs, and blue sky. (C. 5327). Ford management also recognized that black dealer candidates were being targeted for dealerships in less desirable locations. Beginning in 1987 Ford Motor Credit Company experienced higher credit losses on the black dealer portfolio due, in

part, "from the geographic and demographic disadvantages that many black dealers faced because of geographic location." (C. 5310). These factors led Ford management to conclude in October 1987 that "because of the marginal profitability of newly appointed dealers, and our aggressive black dealer appointment target, we will continue to have a high number of black loss dealers until they have gained more retail experience." (C. 4739). Ford made no distinction in this regard as to private capital or dealer development dealers.

3. Ford management commenced aggressively prospecting for black dealer candidates after the announcement of the extremely aggressive appointment objectives in December 1984. (C. 4704). Ford management recognized its goals were in jeopardy as early as October 1986 when the following was stated: "Unfortunately, the number of newly appointed private capital dealers have not increased significantly. . . . The lack of candidates with required unencumbered capital, approximately $350,000, has significantly reduced our ability to appoint private capital investors." (C. 4117). In November 1987 Ford management stated that "[t]he primary problem confronting the Vehicle Divisions is the availability of points acceptable to black candidates on the basis of cost, size, profit potential and location." (C. 4733). In October 1987 Ford management conceded that "[t]o date, the record of attracting private capital dealer appointments has been disappointing." (C. 4754).

4. Given the dismal experience of black dealers participating in Ford's Minority Dealer Program, how would it be possible for Ford in 1988 to recruit a black private capital dealer candidate? It was done in the case of Mr.

Foster by misrepresenting the profitability experience of black dealer candidates participating in the Program, by concealing the historical data showing these representations to be false, and by providing to Mr. Foster and Mr. Sperau an intentionally deceptive sales and profit forecast and capitalization requirement based on facts known to Ford management. Commencing in late February 1988 Don Kitchens, the Atlanta District Market Representation Manager, targeted Mr. Foster for the Selma, Alabama dealership. (R. 293, 295). Kitchens told Mr. Foster that "the vast majority of Ford minority dealers were profitable" and that "the vast majority of Ford minority dealers were making money." (R. 839). These representations were false.

5. On February 22, 1988 Mr. Foster was provided the first of two sales and profit forecasts by Don Kitchens for the Selma dealership. (R. 297-299). Mr. Kitchens explained that "the sales and profit forecast is used more or less as a prospectus for that dealership point. . . . " (R. 8340). Robert Sullivan, a senior Ford executive, admitted that the information known to Ford concerning the black dealer historical performance would be material in preparation of a sales and profit forecast for a newly appointed black minority dealer. (R. 928).

6. On February 25, 1988 Mr. Foster and Mr. Sperau declined to invest in the Selma dealership. (R. 1885). At that time Ford management was desperate to find a full time dealer as quickly as possible for Selma.[3] Ford

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[3] At the time Respondents went to Selma, the dealership was not making money. (R. 1030).

management also made it a "number one priority" to appoint a black dealer for Selma. (R. 1670, 1834). The Atlanta District Sales Office was assigned a quota of twelve minority dealers by year-end 1988 and the appointment of a black dealer for Selma would represent the eighth minority dealer in meeting the quota of twelve. (R. 1885). When Mr. Foster and Mr. Sperau rejected the Selma dealership Mr. Kitchens had exhausted his list of available black dealer candidates. (R. 1885-1887). Shortly after Mr. Foster and Mr. Sperau rejected the offer, Ford management manipulated the sales and profit forecast and capitalization requirement to show a return on guide investment of 65.4% and a capitalization requirement of $535,000. (C. 4194). Mr. Kitchens told Mr. Foster that the sales and profit forecast and capitalization requirement were reliable. (R. 305). Based upon the representations made by Ford management, including the representations made in the sales and profit forecast and capitalization requirement, Mr. Foster and Mr. Sperau were induced to acquire the Selma Ford dealership and thereby incur debt in excess of $1 million related thereto.

7. The evidence in the case established that the representations made by Ford management in the sales and profit forecast and capitalization requirement, as well as oral representations, were intentionally misleading based upon facts known to Ford.

a. Ford management knew that Mr. Foster and Mr. Sperau lacked experience in the operation of a Ford dealership. Respondents' lack of experience and lack of ability to obtain operating capital was the basis for Ford Motor Credit Company recommending rejection of their loan application. (R. 648). Respondents were able to raise

only $285,000 in unencumbered capital for the dealership – well short of the $350,000 Ford internal guideline for private capital dealerships. Nevertheless, Ford management represented that the dealership was adequately capitalized.

b. Ford management was also aware that Mr. Foster and Mr. Sperau would incur substantial debt service relating to the acquisition of the Selma dealership, which would create the high fixed costs identified as a second factor for black dealership losses.[4]

c. The geographic and demographic factors identified by Ford were also significant to the viability of the Selma, Alabama dealership.

8. Respondents' expert economist, Dr. Carter, opined that the sales and profit forecast and capitalization requirements provided by Ford to Mr. Foster and Mr. Sperau were not reasonable or reliable based upon historical information known to Ford. (R. 1255-57, 1319-23). There was clear and convincing evidence from which the jury could determine that Ford used intentionally misleading sales and profit forecasts to lure black dealer candidates to acquire Ford dealerships in less desirable locations. Dr. Carter concluded that based upon his examination of available data the increase in Ford's black dealer count and in funds invested by Ford black dealer

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[4] Ford's suggestion that the Selma Deason dealership with low debt service is at all comparable to the dealership acquired by Mr. Foster and Mr. Sperau with more than $1 million debt service is misleading.

candidates was inconsistent with the historical investment experience of the black dealer body of Ford, if the facts known to Ford management were disclosed to black dealer candidates (R. 1277). During the period 1982 through 1987, 42% of Ford's black dealers lost money. (R. 1267-69). The average return on guide investment for black dealers during the period 1982 through 1987 was 10.7%. (R. 1277). Notwithstanding the number of black loss Ford dealers and the low return on guide investment for black Ford dealers, the trend of investment rose during the period 1982 through 1987 from $11.3 million to $98.1 million of funds invested by black Ford dealer candidates. (R. 1276). Also, during the same period the Ford dealer count rose dramatically in comparison to both General Motors and Chrysler. Given the facts which were known to Ford management at the time they provided Mr. Foster and Mr. Sperau the sales and profit forecast and capitalization requirement in this case showing a 65.4% return on investment, the finder of fact could do no less than determine that the representations made were intentionally misleading.

9. In accordance with Ala. Code 1975, § 6-11-20 the jury was instructed that it could award punitive damages "only if it is shown by clear and convincing evidence that the fraud or deceit was an intentional misrepresentation, deceit or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of his property or legal rights or otherwise causing injury." (R. 2105). Ford did not object to any of the jury instructions given by the trial court, including those on

intentional fraud and damages. (R. 2076-2115). The jury returned a verdict in favor of the plaintiffs which included an award of punitive damages in the amount of $6 million. The jury also returned a verdict in favor of Ford Motor Credit Company in the amount of $635,000.

10. On April 28 and 29, 1994 the trial court heard extensive evidence bearing on the issue of the jury's punitive damages verdict in this case.[5] In the course of the trial court's hearing of the evidence, David Smith, Ford's Manager of Minority Dealer Operations and Training Department, explained Ford's motives for suppressing the disclosure of material facts to its dealer candidates in the following excerpt from his testimony:

> Q. Do you believe that Ford Motor Company should encourage its managers, district managers or those persons who were involved in the appointment process they should disclose whatever information, as long as it is not privileged, to an applicant?
>
> A. No because I think that's like saying a discouragement rather than an encouragement. If someone says, well, if you go into this business you know all these guys over there lost money, that's a discouragement. And we don't want to discourage people to go into business if they qualify. It's our business to encourage people to go into business. (R. 2376-2377).

Upon thorough review of the law and evidence applicable to the case, the trial court determined that there was clear and convincing evidence supporting the jury's

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[5] The trial court's *Hammond* order is reproduced at pages 43a through 52a of the Petitioner's Appendix.

award of punitive damages in the amount of $6 million. On July 1, 1994 plaintiffs filed their notice of acceptance of remittitur which resulted in a final judgment for the plaintiffs against Ford Motor Company in the amount of $1,692,000 in compensatory damages and $6 million in punitive damages. (C. 4114).

11. On June 9, 1995 the Supreme Court of Alabama issued its *per curiam* opinion affirming the verdict and judgment entered in the case. The Supreme Court of Alabama was unanimous in its determination that Ford had committed an intentional fraud against the plaintiffs supporting the award of punitive damages.[6]

REASONS FOR DENYING THE WRIT

1. There Are No Special And Important Reasons For Granting A Writ In This Case.

This Court has previously decided the issues controlling in this case in its decisions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993).

The procedures utilized by the trial court and by the Supreme Court of Alabama in this case for review of the punitive damages award were those approved by this

[6] The dispute concerning the award of punitive damages in excess of $250,000 was based upon an incorrect assumption on the part of the dissenting justices concerning the applicability of a statutory cap to the facts of the case.

Court in *Haslip, supra.* Ford presents no compelling reasons for this Court to reconsider its prior decisions nor does Ford show any violation of due process in this case.

2. Ford Had Fair Notice That Its Commission Of An Intentional Fraud Would Subject It To The Imposition Of Punitive Damages In This Case.

At the trial of this case Ford agreed that the jury instructions regarding intentional fraud and damages were correct statements of Alabama law applicable to this case. The following excerpt from the punitive damage instruction given by the trial court is particularly germane to Ford's argument on lack of fair notice:

> [I]f you are reasonably satisfied that the defendant has been shown by clear and convincing evidence to be guilty of an intentional misrepresentation, deceit or concealment of a material fact, that he had a duty to disclose, which was gross, oppressive, or malicious, and committed with the intention on the part of the defendant of thereby depriving the plaintiff of his property or of legal rights or otherwise causing injury to the plaintiffs, and the plaintiffs did in fact suffer injury or damage as a proximate result of such fraud or deceit, then in your discretion you may award the plaintiff punitive damages in addition to any actual damages you find from the evidence the plaintiffs did suffer. (R. 2106).

Ford has waived any constitutional attack on the ground that it had no fair notice that its commission of an intentional fraud could subject it to an award of punitive damages. By its assent to the jury instructions

Ford agreed that if the jury found that Ford had committed an intentional fraud against the Respondents, punitive damages could be awarded. *See TXO, supra,* 123 L.Ed.2d at 383 (discussing failure to object to iury charge as waiver).

Ford ineffectively attempts to disguise a sufficiency-of-the-evidence, factual argument as a due process constitutional issue. Ford seeks a *de novo* hearing on the facts determined by the jury. Ford asks this Court to substitute its discretion for that of the trial court and the Supreme Court of Alabama regarding the finding that there was clear and convincing evidence to support the jury's determination that Ford perpetrated an intentional fraud.

Mr. Foster and Mr. Sperau contended and proved that Ford intended to cause them harm by inducing them through intentional fraud to acquire the Selma Ford dealership and to thereby incur over $1 million of debt related thereto. However, Ford argues that the imposition of punitive damages in this case is contrary to Ala. Code 1975, § 6-11-20 and is thus a denial of due process because there is no evidence that Ford intended to cause Respondents harm. Ford advances the preposterous argument that it intended that Mr. Foster and Mr. Sperau succeed when the fraud was perpetrated; therefore, its good motives should negate any intent to harm. Pet. at 22.

The evidence in this case, as summarized by the trial court in the following excerpt from its *Hammond* order, makes apparent that Ford's argument on this point is frivolous:

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs due to the Defendants' fraudulent conduct and its duration supports the jury's punitive damages award in this case.

"There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstances similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

* * *

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the

> same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers.
>
> "Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. . . . "

Pet. App., 27a-29a.

The issue of Ford's intent to deceive was properly a question for the jury in this case. The jury, having heard the evidence, did not accept that Ford intended Respondents no harm when it fraudulently induced them to incur over $1 million of debt to acquire the Selma Ford dealership. The trial court recognized that Ford's motivation was not so pure and beneficent as Ford would have this Court believe:

> "Another of the factors to be considered is whether the Defendant profited or received a benefit from its misconduct. Ford derived a substantial benefit from its recruitment of black dealer candidates including the Plaintiffs. Ford management stated in the October, 1987 Equal Opportunity Progress Report that i[t]s black dealerships had sales of Ford products amounting to $1 billion. The corporate benefit of the black dealer body in dollars to Ford is significant. The Plaintiffs point out that River City

> Ford sold approximately $15 million in Ford products. They also maintain that the black dealer program provided Ford the added benefits of positive corporate image and a means of keeping dealerships in less desirable geographic locations in business."

Pet. App., 29a.

The jury, the trial court, and the Supreme Court of Alabama did not abuse their independent discretion in determining that Ford's perpetration of an intentional fraud against the Respondents warranted the imposition of punitive damages under Alabama law in this case.

3. The Punitive Damage Award In This Case Does Not Violate The Due Process Clause Of The Fourteenth Amendment On The Ground of Excessiveness.

The most telling fact accentuating the baselessness of Ford's petition is that Ford cites neither *Haslip* nor *TXO*, this Court's controlling precedents, in support of its argument that the punitive damage award in this case is excessive. Ford effectively concedes that there has been no violation of due process under the Fourteenth Amendment as construed under these decisions.

Since existing precedents do not support its argument, Ford relies instead on an undecided case, *BMW of North America, Inc. v. Gore*, No. 94-896. Ford recognizes, though, that *BMW* is distinguishable from the instant case for the reason that "the ratio of punitive damages to compensatory damages in this case is not enormous (as it is in *BMW*). . . . " Pet., 25.

Having failed to show that *BMW* could conceivably apply in this case, Ford resorts once again to a factual argument, contending that "the conduct for which Ford is being punished is minimally (if at all) reprehensible." Pet., 25. The reprehensibility of the wrong is a specific factor which must be considered by the trial court and reviewed by the Supreme Court of Alabama in any case in which punitive damages have been awarded. *See Haslip, supra.* The reprehensibility of the wrong committed by Ford in this case was determined by the jury based on the evidence, was specifically reviewed and addressed by the trial court in its *Hammond* order, and was again reviewed and addressed by the Supreme Court of Alabama. Ford has received the legal process and protection to which it was due under the law of Alabama and under the Fourteenth Amendment.

Ford has distorted selected facts in order to minimize the gravity of its fraudulent conduct. Ford maintains that data contained in its Equal Opportunity Progress Reports ("EOP Reports") were immaterial to the Respondents because (1) the data in the EOP Reports would have been misleading to them because they were private capital dealers rather than dealer development operators, and (2) Mr. Sperau is white and the information in the EOP Reports relating to minority dealerships would be immaterial to a new, white-operated dealership.

It happens in this case that the Respondents, one of whom is African-American, were solicited by Ford to participate in Ford's Minority Dealer Program, which Program is the subject of the EOP Reports. It is Ford which made the fact that Mr. Foster is African-American the *sine qua non* to the solicitation of Respondents for the

Selma Ford dealership. However, one of the most significant facts stated in the EOP Reports has nothing whatsoever to do with the race of the dealer, but rather relates to the experience of the dealer.

Robert Sullivan, a senior Ford executive who assisted in the preparation of the EOP Reports, made the following admission upon reading an excerpt from the 1987 Report:

> Q. Read that bottom paragraph to the jury, please.
>
> A. *"Because of the marginal profitability of newly appointed dealers and our aggressive black dealer appointment target we will continue to have a high number of black loss dealers until they gain more retail experience."*
>
> Q. *Was that true in November of 1987?*
>
> A. *Yes.*
>
> Q. *And did the management of Ford know that to be true?*
>
> A. *Yes.*
>
> Q. *That you had marginal profitability of newly appointed black dealers.*
>
> A. *Yes, it says marginal profitability of newly appointed dealers.*
>
> Q. *Wasn't this referring to minority dealers?*
>
> A. *Yes, it is. Also is true for non-minority dealers.*

(Emphasis added.) (R. 1748-49).

Mr. Sullivan and Ford management were well aware that newly appointed Ford dealers experienced "marginal

profitability" – without regard to race. Yet, even knowing this fact, Ford induced Respondents, and other new dealer candidates, with sales and profit forecasts showing substantial returns on investment, which in Respondents' case was 65.4%.

Ford Motor Credit also recognized the significance of the fact that Respondents were new dealer candidates with no experience in the operation of a Ford dealership. Ford Motor Credit management cited lack of experience as the primary factor in recommending rejection of Respondents' loan application. (R. 635, 644-45, 648). Ford Motor Credit knew that, as new dealer candidates, Respondents would not attain 65.4% return on their investment, that consequently the dealership would lack adequate capital going in, and that with no means of raising additional capital, Respondents constituted a poor credit risk to Ford Motor Credit. The facts known to Ford and its subsidiary regarding new dealer profitability experience, given the representations made to Respondents by Ford concerning the reliability of the sales and profit forecasts and capitalization requirements, were unquestionably facts as material to Respondents in incurring over $1 million in debt to acquire the Selma Ford dealership as those same facts were material to Ford Motor Credit in making its credit decision regarding that same dealership.[7]

The fact that Respondents were new dealer candidates is significant as well to Ford's argument that the group statistics in the EOP Reports were immaterial

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[7] Ford, which is experienced as a franchisor and offeror of securities to public investors, routinely discloses this type of information in its solicitation.

because the statistics included dealer development operators, not just private capital operators. The one universal constant which was known to Ford was that newly appointed dealers – minority and non-minority, private capital and dealer development – were "marginally profitable." Moreover, Robert Sullivan acknowledged that this fact would be material in preparing a sales and profit forecast for a new minority dealership. (R. 927-29).

Mr. Foster, contrary to Ford's representations, actively participated in the management and operation of the Selma dealership. This notwithstanding, Ford contends that because the Selma dealership was operated by Mr. Sperau, a white with no experience in the operation of a Ford dealership, that Ford had reason to believe that the facts contained in the EOP Reports would not apply because that information related only to minority operated dealerships. Even ignoring the fact that Mr. Foster is African-American for purposes of Ford's argument, the fact still remains that newly appointed dealers – minority and non-minority alike – had the same marginal profitability experience.[8]

Ford apparently still does not grasp the import of this evidence. Ford claims that it is being punished because it did not disclose misleading data, "which allegedly might have discouraged respondents from purchasing what at that time was a highly successful dealership." Pet., 25. The dealership, which Ford now admits

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[8] Even with Ford's start-up subsidies for a new minority dealership, River City Ford was unable to attain even one-half the 65.4% return on guide investment projected by Ford during its first year.

was a "highly successful dealership", was represented to Respondents by Ford management to be a low volume, low overhead operation that was not meeting its potential. The sales and profit forecast and capitalization requirement provided by Ford management to Respondents bore faint resemblance to the prior dealership historical volume, overhead, or profit. (C. 4194-95). Ford management knew that the assets of the Deason dealership could not be purchased and the successor dealership continue to operate at the same volume and overhead. Had Ford management admitted to Respondents at the time, as it has before this Court, that Ford considered the Deason dealership to be a "highly successful dealership", then there would have been no River City Ford because the numbers would not have supported the investment. Ford's statement begs the question: "If, in Ford's informed judgment, the Deason dealership was 'highly successful' based on its historical performance, then does this not prove that the 65.4% projection provided to Respondents by Ford as new dealer candidates was intentionally misleading?" This is absolutely the case based upon Ford's belated admission that the Deason dealership was meeting reasonable expectations for the Selma market for a well established dealership.

Ford's argument on the suppression issue turns logic on its head.[9] Ford's argument presumes that it had no choice but to provide the Respondents a sales and profit forecast showing a 65.4% return on investment and a

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[9] Respondents' suppression claim arose from the intentional misrepresentations made by Ford concerning the 65.4% return on investment and capitalization requirement.

capitalization requirement below Ford's minimum internal guidelines. However, Ford was not called upon or expected to provide the Respondents a sales and profit forecast or capitalization requirement of any kind, or for that matter to make any representations whatsoever concerning the Deason dealership, but when Ford *chose* to speak, the duty to speak the truth and to fully disclose material facts concerning its representations arose. The truth of the matter is that, based upon the facts known to Ford at the time the representations were made to Respondents, a 65.4% return on investment projection was affirmatively misleading (*i.e.*, unreasonable) to any new dealer candidate, white or black.[10]

CONCLUSION

At the *Hammond* hearing in this case Mel Farr, the Chairman of the Ford Lincoln-Mercury Black Dealer's Association, expressed succinctly the meaning of the jury's punitive damages verdict. When asked his understanding of the verdict Mr. Farr responded, "That a large sum of money was awarded because of the fact that Ford Motor Company lied to the investors." (R. 2410). Mr. Farr understands what this case is about, and it is not about conduct that is "minimally reprehensible."

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[10] Ford did not defend this case on the basis that the sales and profit forecast or capitalization requirement were reasonable; rather, Ford asserted that the Respondents could not justifiably rely upon the representations made by Ford.

Ford has presented no reason to grant *certiorari* in this case or to hold Ford's petition pending a decision in *BMW*.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY, *Petitioner*

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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BMW of North America, Inc. v. *Gore*,
No. 94-896 8

REPLY BRIEF FOR THE PETITIONER

In an effort to portray Ford's conduct in this case as sinister, respondents have taken evidence out of context, misrepresented facts, and made assertions that have no support in the record. Even if every word they say were true, the facts would fall far short of justifying the enormous punishment inflicted on Ford in this case. In fact, when the smoke they have thrown up is cleared away, it becomes clear that Ford was punished $6 million for failing to discourage respondents from purchasing a profitable dealership because Foster is black. If the Due Process Clause provides any protection from arbitrary and excessive punitive exactions, the present case cries out for its invocation.

REPLY STATEMENT OF FACTS

Respondents attempt to spin a yarn of "intentional fraud" from snippets of innocent facts taken out of context, distortions of the record, and unsupported assertions. The record simply does not support their efforts to make something that was entirely benign look nefarious, or to make a case that is in reality quite straightforward look as though it had disqualifying factual complexities.[1]

1. *Ford's efforts to increase the number of minority-owned dealerships.* The central strand of respondents' theory of "intentional fraud" is the entirely admirable fact that Ford had committed to increasing the number of minority-owned dealerships. See Opp. 1-3. Respondents insinuate that Ford was so intent upon achieving this laudable goal that it created incentives for its employees to do and say anything to increase the number of black-owned dealerships. The record refutes that implication. Although Ford has long impressed upon its personnel the desirability of increasing the number of minority-owned dealerships and even established objec-

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[1] Space constraints prevent us from correcting all of respondents' numerous misleading references and unsupported assertions. The many that we do correct demonstrate that the remaining factual assertions should be regarded with a healthy skepticism.

tives[2] that could be a factor in performance evaluations, there is no evidence whatever that any employee ever felt pressured to mislead a prospective dealer or to appoint a minority dealer who was destined to fail. To the contrary, the record is unequivocal that neither Ford nor its employees have any incentive to encourage the appointment of a dealer (whether black or white) who is unlikely to succeed. R. 1448, 1543-1544, 1653-1654, 1746-1747, 1808-1809, 1954-1955, 2286, 2288. When a dealership fails, Ford experiences substantial, unrecoverable costs in terms of foregone sales, loss of customer goodwill, loss of market share, and the expense of obtaining a replacement dealer. R. 1477-1478, 1544, 1808, 2239-2242, 2286. Relatedly, it is not a plus for the career of a Ford employee to facilitate appointment of dealers (whether white or black) who ultimately fail. R. 1809, 2448.

2. *The Equal Opportunity Progress Reports*. As they have throughout this case, respondents invoke isolated passages from Ford's Equal Opportunity Progress ("EOP") Reports in an effort to imply that Ford management knew that minority-owned dealerships were destined to be unsuccessful, yet nonetheless committed to increasing the number of such dealerships. See Opp. 2-3. These reports, like Ford's goal of increasing the number of minority-owned dealerships itself, are the model of admirable corporate behavior, not "smoking-gun" evidence of an egregious scheme to defraud. Read in their entirety (rather than in isolated snippets as respondents prefer), the reports reflect an on-going process of setting objectives, monitoring their progress, and reporting that progress to the board of directors.[3]

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[2] The assertion (Opp. 5) that the Atlanta Sales Office was assigned a "quota" is false. Kitchens testified that the office had an "objective" of 12 minority-owned dealerships; he expressly rejected the suggestion that this was a "quota." R. 1883-1884.

[3] The EOP Reports reflect that the goal of increased numbers of minority-owned dealerships was in substantial part a result of constructive

The EOP Reports also set forth the support programs that Ford makes available in order to assist minority dealers. C. 4688-4690, 4712-4713. These include the Dealer Development program (see Pet. 3-4), which Ford makes available to candidates who either cannot raise sufficient capital to purchase a dealership outright or who are forecast to experience losses during the first year of operations. C. 4689, 4712. Under that program, Ford "absorbs any losses while the dealer's investment is held in escrow." *Ibid.* The reports reflect that, in a given year, over half of the minority-owned dealerships receive benefits under this program. See, *e.g.*, C. 4709 (119 black dealers as of July 1986); C. 4712 (66 black-owned dealerships received funds under the program). The reports reflect that, overall, Ford spends roughly $50 million per year on its Minority Dealer Program. C. 4690.

The EOP Reports do, of course, contain data on the performance of black-owned dealerships as a group.[4] As respondents studiously ignore, however, the data are group averages for *all* black-owned dealerships, including the more than 50% annually that receive assistance through the Dealer Development program. When the employees responsible for

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meetings with existing Ford minority dealers. See, *e.g.*, C. 4682 ("[A] series of meetings were held with the Black Ford and Lincoln-Mercury Dealer Association. As a result of the sessions, [Ford] agreed to accelerate its black dealer count objectives for 1985 and establish long term goals."). This fact alone undermines the suggestion that, in attempting to increase the number of minority-owned dealerships, Ford was engaged in some kind of deliberate fraud.

[4] The data are not by any means uniformly discouraging. For example, the reports reflect that, based on results for the first eight months of 1987 (the year before respondents purchased the assets of the Selma dealership), 71 black dealers were expected to earn profits of over $100,000 in 1987 — up from 6 in 1982. Twenty-one of these dealers were expected to earn over $500,000 and one was expected to earn over $2 million. C. 4739. Needless to say, respondents did not complain about the non-disclosure of these *encouraging* statistics.

preparing the EOP Reports reviewed data for private capital dealers alone (the category relevant to respondents), they found and reported that black private capital dealers had not performed materially differently from the overall dealership body. See C. 4738.

Respondents emphasize (Opp. 3) that the EOP Reports also contain conclusions that *new* black dealers, *as a group*, are marginally profitable and observations about why this is so. Here again, the reports do not differentiate between private capital dealers and dealer development operators. Given that the Dealer Development program was used for dealerships that were projected to lose money in their first year, however, the statements in the reports are both entirely unsurprising and entirely irrelevant to respondents' case. The irrelevancy is further confirmed by the particulars of respondents' situation. For example, the reports observed that, among other things, newly appointed minority dealers "typically experience a high initial turnover of people" and "have experienced difficulty in attracting qualified management personnel." C. 4711. This concern manifestly did not apply to the Selma dealership whose staff, including the highly experienced general manager, committed to staying on. R. 492-493, 1605-1606. The reports also observed that many black dealers face disadvantages because of geographic location. C. 5310. This observation, which relates to the fact that many Dealer Development dealerships are located in low-income areas where it is difficult to generate large sales quickly, had no application to Foster and Sperau, who were purchasing the assets of a dealership with a history of profitability. See R. 440-441, 1598, 1603-1604, 1699-1700.[5]

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[5] The reports also mention higher fixed costs as being a problem for many new black dealers. As with the other factors, there was no evidence that this problem afflicted River City Ford. Not surprisingly, respondents ignore the one explanation for their problems that *is* supported by the record — their extravagant diversion of dealership funds (see Pet. 11-12).

3. *The "vast majority" claim.* Respondents assert (Opp. 3-4) that Ford was able to continue appointing black candidates in the face of "the dismal experience of black dealers" only by misrepresenting the profitability experience of minority dealers. In particular, respondents claim (*id.* at 4) that Kitchens misrepresented to them that "the vast majority of Ford minority dealers were making money." There is no evidence, however, either that Kitchens and the other employees involved in appointing dealers had access to the EOP Reports or that Ford management ever instructed those employees to misrepresent anything in order to sign up a minority dealer. Moreover, the reports reflect that in 1987, the last year for which data were available prior to respondents' acquisition of the dealership, 77% of all black-owned dealerships and 89% of black-owned private capital dealerships were profitable. C. 4738. Thus, the alleged representation that the "vast majority" of black-owned dealerships were making money was *true*. Indeed, although respondents ignore it, the trial court directed a verdict against them on this aspect of their misrepresentation claim. R. 1429.

4. *The assertion that the sales and profit forecast and capitalization requirement were "intentionally misleading."* Respondents assert that "Ford management manipulated the sales and profit forecast and capitalization requirement" to induce them to purchase the Selma dealership. Of course, Kitchens — a district market representation manager who reported to the assistant district manager who in turn reported to the district sales manager who in turn reported to the regional manager for the Atlanta region (R. 795-797) — is hardly "Ford management." Moreover, as we pointed out in the petition (at 7-8) and as respondents tellingly ignore, Kitchens explained to Sperau in detail his reasons for changing the capitalization requirement and projected return on capital. Sperau then independently verified the bases for Kitchens' figures. *Id.* at 8.

Respondents contend (Opp. 5-6) that the sales and profit forecast and capitalization requirement "were intentionally misleading" because Ford's internal guidelines reflect that private capital dealerships should have $350,000 in unencumbered capital. That contention, of course, has nothing to do with the race-based theory upon which the case was tried and the jury was instructed. Moreover, it suffers from the same basic flaw as respondents' race-based arguments: it is based on a generality. Although many dealerships require $350,000 or more in unencumbered capital because of their size, there is no evidence that a dealership of the size of *River City Ford* requires unencumbered capital of as much as $350,000.

Shifting back to their race-based arguments, respondents assert (Opp. 6-7) that Dr. Carter's data support the conclusion that "Ford used intentionally misleading sales and profit forecasts to lure black dealer candidates to acquire Ford dealerships in less desirable locations." This contention is absurd given respondents' failure to adduce even a shred of evidence about what kind of sales and profit forecasts were given to other black prospective dealers in other circumstances. Moreover, here again respondents rely on the assumption that generalized data and observations are applicable to individual dealership candidates.[6] In this case there was no evidence that River City Ford was in an undesirable

---

[6] As explained in detail by a Ford employee who was intimately involved in preparing the EOP Reports, Dr. Carter's data and conclusions, in addition to being entirely irrelevant to respondents, were based upon manifestly false information regarding the number of black dealers that went out of business each year. R. 1738-1745, 2291-2292, 2325-2327. This testimony was supported by a Ford Vice President (R. 2450-2451) and by Mel Farr, the Chairman of the Ford-Lincoln Mercury Black Dealers Association (R. 2430). Although one could not tell it from respondents' out-of-context quotation (Opp. 20), Farr testified passionately in favor of Ford and against the race-based theory of liability upon which respondents' $6 million punitive windfall is predicated, observing that such a theory is inimical to the goal of increased opportunity for black entrepreneurs. See R. 2390-2434.

location. To the contrary, the evidence was that Selma had been a profitable location for the prior dealership.[7]

In short, there is not a stitch of evidence in the record that Kitchens (let alone Ford management) deliberately misrepresented the capitalization requirement and projected return on capital in order to induce respondents to purchase the dealership.

ARGUMENT

A. The Notice Issue

1. Respondents contend (Opp. 10-11) that Ford waived this argument by acquiescing in the punitive damages instruction. But there was no reason to object, for the instruction *correctly* stated the "intent to injure" requirement. The failure to object to a correct instruction cannot possibly waive the claim that the Alabama courts retroactively abandoned the standard for punitive liability articulated in that instruction, thereby depriving Ford of its right to fair notice that its conduct could be subject to punishment.

2. Respondents characterize Ford's argument as merely an attempt to relitigate the Alabama courts' sufficiency determinations. Opp. 11. They are mistaken. Ford's argument is that the Alabama courts have retroactively eliminated an indispensable element of the claim for punitive damages — the "intent to injure" requirement. If the Alabama Supreme Court had identified evidence that it considered to support a finding of intent to injure, Ford would have no federal constitutional claim. But because the court instead simply

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[7] It is undisputed that the prior dealership earned over $250,000 in profits in the year before it was sold to respondents. R. 440-441, 1598, 1699-1700. Respondents' representation (Opp. 4 n.3) that the dealership was not making any money (based on Sperau's uncorroborated assertion about the state of affairs after the dealer died) is thus grossly misleading. So too is the related statement (*id.* at 4) that "Ford management was desperate to find a full time dealer as quickly as possible." See R. 1618.

equated the intent to induce reliance with the intent to injure, thereby reading the latter out of Alabama's punitive damages statute, Ford does have a notice claim.

3. Respondents quote at length from the trial court's *Hammond* order in an effort to create the impression that there was indeed evidence of an intent to injure. See Opp. 12-14. But, as their failure to cite a single page from the record reflects, there simply was no such evidence in this case.[8] The quotations from the *Hammond* order simply confirm that the Alabama courts have read the intent to injure requirement out of Alabama law by equating it with the intent to induce reliance.

B. The Excessiveness Issue

1. Respondents suggest (Opp. 14-15) that *BMW* can have no conceivable bearing on Ford's petition because the punitive damages in this case do not bear the same high ratio to the compensatory damages as in *BMW*. However, as the petitioner in *BMW* points out in its merits brief (at 31-32), just as a high ratio does not always require the conclusion that a punishment is excessive, a low ratio is not enough to immunize a multi-million dollar punishment that bears no relationship to the gravity of the defendant's misconduct. Accordingly, if the Court reaches the excessiveness issue in *BMW*, its reasoning could well bear on the disposition of Ford's petition.

2. Respondents contend (Opp. 15) that Ford has "minimize[d] the gravity" of its alleged misconduct. According to respondents, Ford knew that new dealers as a group are only marginally profitable but nonetheless deliberately projected for them a highly optimistic return on capital. In making this

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[8] For example, the trial court's statement (see Opp. 13) that "Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers" is entirely unsupported by the record.

argument, respondents are seeking to rely on a theory that formed no part of their complaint at trial. Respondents simply did not ask that Ford be punished for "suppressing" facts about the success rates of new dealers or claim that it was this omission that constituted the fraud. Rather, their evidence and argument focused on Foster's race and Ford's data relating to minority-owned dealerships. Similarly, their theory-of-the-case instruction focused squarely and exclusively on their contention that the sales and profit forecast and capitalization requirement were fraudulent in view of the historical performance of *black*-owned dealerships. See Pet. 13-14. There is simply no possibility that the jury's punishment decision was based on suppression of general new-dealer success rates. The fact that they now seek refuge in the off-hand comment of a single witness is an indication of how weak their claim of reprehensibility truly is.

Even putting aside the fact that the "new dealer" theory was not the basis for the verdict, it hardly supports the suggestion that Ford engaged in egregious misconduct. Whether or not a newly appointed dealer is able to turn a profit right away depends on numerous circumstances specific to the dealership in question.[9] Here, respondents were purchasing the assets of a dealership that was profitable historically and whose key personnel had committed to stay on. Thus, there is not the slightest bit of support in the record for the suggestion that Ford knew that *this* dealership would be only marginally profitable. To the contrary, the record reflects that River City Ford earned over $100,000 in

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[9] Although Sperau was a newly appointed dealer, respondents' assertion (Opp. 18) that he had "no experience in the operation of a Ford dealership" is flatly false. See C. 4641, 4833. So too is the implication (Opp. 18) that Ford expected that Foster would be involved in the operation of the dealership. As respondents themselves adduced at trial, Ford considered Foster an "investor only" and expected that the dealership would be operated by Sperau. R. 1887-1888. See also R. 328-329, 342-343, 346, 481, 492, 500, 915, 1082-1083, 1085; C. 4482, 4814.

its first seven months of operations. Pet. App. 13a; R. 585, 982.

3. Respondents make a bewildering argument based on the fact that the prior dealership was highly successful. Opp. 18-19. This argument apparently assumes that, because the dealership already was doing well, it could not do even better and thus could not realistically have been expected to earn a 65.4% return on capital. This theory too is entirely contrived after the fact for the benefit of this Court. In any event, it cannot be squared with the record. It is undisputed that Kitchens' projections took into account respondents' own ambitious plans for operating the dealership. R. 1841-1842, 1861-1862. Moreover, Sperau conceded that he reviewed with Kitchens all of Kitchens' projections and then independently investigated them by visiting the dealership and talking with the general manager. See Pet. 7-8. It is preposterous to suggest that Ford committed a grievous fraud by giving respondents projections that Sperau ultimately concluded were reasonable based upon his own due diligence.

CONCLUSION

Respondents have tried mightily to make this case look factually messy in order to defeat certiorari. But fabrications do not equate with messy facts. This case squarely frames two of the central problems with modern-day punitive damages litigation: (1) the inferior courts are routinely allowing punitive damages to be imposed for conduct that the defendant could not reasonably have known was punishable; and (2) in evaluating whether punitive exactions are excessive, the courts simply are not distinguishing mundane business transactions from egregious misconduct. This case accordingly presents an excellent opportunity to provide guidance — and discipline — on these important issues. The petition for certiorari should be granted.

Respectfully submitted.

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On Petition for Writ of Certiorari to the Supreme Court of Alabama

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BUSINESS COUNCIL OF ALABAMA IN SUPPORT OF PETITIONER

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MOTION OF THE BUSINESS COUNCIL OF ALABAMA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of this Court, *amicus*, the Business Council of Alabama, hereby moves for leave to file the attached brief *amicus curiae*. Petitioner has granted but respondents have refused to grant consent for the Business Council to file a brief *amicus curiae* in this case.

The Business Council is an association of over 4,000 Alabama businesses with a unique concern about the legal

environment in Alabama. The Business Council has long been active in the fight against arbitrary and unfair punitive damage awards, and has filed briefs *amicus curiae* in other punitive damage cases before this Court. The attached brief supports a grant of certiorari on the first question presented by the petition. Amicus seeks to bring to the Court's attention some considerations relevant to this question that have not been fully developed by the parties, most notably the pernicious effects of the Alabama Supreme Court's decision in this case.

Amicus therefore respectfully requests leave to file the attached brief *amicus curiae*.

December 15, 1995

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-771

FORD MOTOR COMPANY,

Petitioner,

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

BRIEF *AMICUS CURIAE* OF THE BUSINESS COUNCIL OF ALABAMA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Business Council of Alabama is a non-profit association of over 4,000 businesses of all sizes and types including, for example, grocers, dry cleaners, restaurants, hardware stores, utilities, manufacturers, and insurers. Its members conduct business throughout Alabama and

therefore are concerned about the threat of arbitrary and unfair punitive damage awards.

The Business Council files this brief in support of petitioner because the decision of the Alabama Supreme Court sanctions punishment for conduct not previously considered unlawful in the State of Alabama. If left intact, this decision will create uncertainty and disruption for those doing business in the State and also will create a material disincentive for those contemplating doing business in Alabama. This harm is compounded because the decision appears to condone and even encourage differential and discriminatory treatment based upon considerations of race.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari in this case to resolve finally that a state may not constitutionally punish a defendant without clear prior notice that the conduct at issue is against public policy and subject to punishment. The Alabama Supreme Court upheld an extraordinary award of punitive damages against Ford for conduct that Ford had no notice would subject it to liability. The due process violation is particularly egregious because Ford was punished for *failing* to act in a manner that would plainly have been contrary to public policy. Ford acted in accordance with a program designed to stimulate business opportunities for minorities; it was punished for failing to *discourage* minorities from accepting such opportunities. The consequence of the Alabama Supreme Court's decision affirming this inexplicable punitive award will be to discourage voluntary minority

outreach efforts, while promoting discriminatory and paternalistic conduct.

ARGUMENT

I

FORD HAD NO NOTICE THAT IT COULD BE PUNISHED FOR FAILING TO ACT IN CONTRAVENTION OF PUBLIC POLICY

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). These basic considerations rise to the level of a due process requirement when a state attempts to impose punishment without fair notice. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). The Due Process Clause of the Fourteenth Amendment requires, at the very least, that a defendant have fair warning of the "egregiously tortious conduct" that will subject the defendant to punitive damages. *TXO Productions Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2724 (1993) (plurality).[1] Notice is

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[1] Without prior notice, liability is retroactive. This Court has indicated that it would not approve retroactive liability "on any theory of deterrence or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (citations omitted). *See also Landgraf*, 114 S. Ct. at 1505 ("Retroactive imposition of punitive damages would raise a serious constitutional question.").

especially important in punitive damage cases because state laws generally do not impose any limit on the size of the fine once a jury finds liability for punitive damages, creating "an acute danger of arbitrary deprivation of property." *Honda Motor Corp.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994).

Ford had no notice that its conduct might be considered "egregiously tortious" in Alabama. To the contrary, Ford sought to achieve a public good through its minority outreach program. Yet Ford was held liable for a $6 million penalty because it failed to provide respondents with statistical information that might be construed to suggest minority Ford dealers were less likely to succeed than other dealers. Ford's punishable offense was its failure to discourage minority applicants from accepting business opportunities with Ford. This is not egregious conduct worthy of punishment; it is precisely the opposite. Ford's refusal to inject race into its contract negotiations is consistent with well-established public policy.

Federal law establishes a strong policy against the use of race as a discouragement in contract offers. Federal civil rights law prohibits racial discrimination in the conditions of a contractual relationship, including offers to make a contract. 42 U.S.C. § 1981; *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989) ("Section 1981 "prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms"). Federal employment and housing law prohibits any advertisement or other invitation to contract that indicates any preference or discrimination on the basis of race. 42 U.S.C. § 2000e-3(b) (employment); 42 U.S.C. § 3604(c) (housing). *See*,

e.g., *Ragan v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905-07 (2d Cir. 1993) (exclusive use of white models in real estate ads violates the Fair Housing Act).

Yet Ford was punished for failing to present to an African-American businessman with whom it wished to contract race-specific data that Mr. Foster contends would have discouraged him from doing business with Ford. According to Mr. Foster, the data would have alerted him that his race made it likely that he would fail as a Ford dealer.[2] It is as if Ford were to be held liable for punitive damages because an advertisement seeking sales personnel *failed* to imply that minority applicants were less likely to earn commissions.

Ford plainly had no notice that its minority outreach efforts would result in punishment for failure to discourage minority participation. Indeed, Ford *did* have notice that it might have been exposed to liability under federal law if it had attempted to discourage minority participation. Respondents cite with approval the trial court's conclusion that there was sufficient evidence that "Ford defrauded the Plaintiffs by using sales and profit forecasts *and capitalization requirements* which were deceptive based upon facts known to Ford." Pet App. 28a (quoted in Opp. at 12) (emphasis added). In other words, Ford was assessed a fine because it established a capitalization requirement that did *not* take into account that Mr. Foster is African American. But if Ford had established such a plainly

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[2] Mr. Foster's contention is particularly irrational because his partner, who actually ran the business, is white.

discriminatory condition to its dealership agreement, it would have been exposed to liability under section 1981. *See, e.g., Cody v. Union Electric*, 518 F.2d 978, 979 (8th Cir. 1975) (complaint that black utility customers were required to pay a larger security deposit than white customers states a claim under section 1981); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 141 (N.D. Ill. 1977) (racially discriminatory pricing scheme in property insurance violates section 1981). *Cf. Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F. Supp. 893, 896-97 (N.D. Ohio 1977) (mortgage agent liable for punitive damages under Fair Housing Act for requiring larger down payment from buyer in neighborhood experiencing racial transition).

Ford cannot constitutionally be punished for failing to take action that would itself have exposed Ford to liability under federal law. "[I]f a citizen [is] constrained by two laws . . . and obedience to one would violate the other, to punish him for violation of either would deny him due process." *Korematsu v. United States*, 323 U.S. 214, 232 (1945) (Roberts, J., dissenting). *Accord United States v. Rivera*, 58 F.3d 600, 602 (11th Cir. 1995); *United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 253 (1993).

II

THE ALABAMA SUPREME COURT'S DECISION WILL HAVE THE PERNICIOUS EFFECT OF LIMITING MINORITY BUSINESS OPPORTUNITIES AND ENCOURAGING PATERNALISTIC CONDUCT

The strong policy against racial intrusions in the contracting process derives from the fundamental principle

that market transactions, like other consequential decisions, should be driven by individual merit and not by group membership. *See, e.g., Patterson*, 491 U.S. at 188 ("The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination"). The Alabama Supreme Court affirmed a punishment against Ford because the company did *not* assume that the respondents were less likely to succeed merely because of race. That race-specific data were seen as material to the dealership transaction and relevant to potential success, and their omission sufficient to support $6 million in punishment, sends a signal that race is an impediment to success in business relations. Respondents' novel theory of liability, now accepted in Alabama, relies on establishing as a "fact" that some individuals are less likely to succeed merely because of their race. This Court cannot allow Ford to be punished for refusing to accept respondents' view of the world. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

The irony of this case is that companies like Ford have established minority outreach programs precisely because historic discrimination has precluded many members of minority groups from achieving success in various business ventures. The solution these outreach

efforts offer is to increase minority business opportunities. Like any other business transaction, there is no guarantee that these opportunities will lead to success. Nonetheless, the respondents sued Ford because they did not succeed. Their argument is that Ford should not have encouraged them to accept the opportunity. The result of Ford's punishment for this allegedly egregious conduct is that successful minority dealers continue to risk their capital and energy in running their businesses, while Mr. Foster, an unsuccessful dealer, can retire on his punitive damages windfall.

The specter of punitive damages in this context puts Ford, and countless other businesses, in an untenable position, for it is unassailable that the business opportunities these companies offer sometimes lead to failure. These failures may not be proportionate across racial groups. A variety of factors determine success. But if a company wishes to improve minority success by increasing minority opportunities, it will be punished in Alabama if it does not emphasize minority failures and thereby undermine the outreach program. An alternative for a company concerned about minority business opportunities might be to avoid liability by guaranteeing minority success. But such a scheme requires invasive programs premised on the notion that members of minority groups cannot make it on their own. This sort of "racial paternalism" has its own noxious consequences. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring). Ford should not be punished for its refusal to adopt one of these extraordinary measures.

CONCLUSION

Ford Motor Company was severely punished for conduct it could not have known was illegal, and was punished for its refusal to assume that members of minority groups are less competent than others to run a business. Plenary review will allow this Court to clarify the nature of the due process limitations on the imposition of liability for punitive damages and send an important signal about equal opportunity.

December 15, 1995

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